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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 247

KALMIA REALTY & INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JUDGE BEN STEVENS,
Hattiesburg, Mississippi,
J. R. BUCHANAN,
L. BARRETT JONES,
Jackson, Mississippi,
WALTER S. WELCH,
GARNER W. GREEN,
Counsel for Petitioners.

WELCH, COOPER & WELCH,
Laurel, Mississippi,
BUCHANAN & MONTGOMERY,
Laurel, Mississippi,
GREEN, GREEN & CHENEY,
801 Standard Life Building,
Jackson, Mississippi,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 247

KALMIA REALTY & INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254, 62 Stat. 928; Section 1331, 62 Stat. 930; Section 1332, 62 Stat. 930; Section 1345, 62 Stat. 933; Section 2101, 63 Stat. 104; together with Rule 38, 5(b) of this Court.

Summary Statement of Matters Involved

Petitioners are defendants in *United States* v. *Kalmia Realty & Insurance Company, et al.,* wherein the District

Court granted the relief of complete cancellation and confirmation, May 11, 1949, Tr. 391, 407, 419, 421, and the Court of Appeals for the Fifth Circuit affirmed in Cause No. 12,965, May 15, 1950, Tr. 445. Opinion, with Conclusions of Law, thereby affirmed, in the District Court, Appendix "A", 181 Fed. 2d 598.

A

The Parties:

1. United States of America, sole complainant and appellee in the Court of Appeals and respondent here.

2. Defendants, appellants and petitioners are:

(a) Kalmia Realty & Insurance Company, et al. (hereinafter called "Kalmia"), the common source of the conventional title and reservor of the minerals; and

(b) Tom Hendrix, holder of an independent state tax title, assumed to be invalidated solely in virtue of *New Brunswick* v. *United States,* 276 U. S. 547, 72 L. ed. 693.

B

The Facts:

1. Kalmia initially owned, prior to the depression, some 20,000 acres of land in Jones and Wayne Counties, Mississippi, wherefor the price had been $3.00 per acre. The depression having come, Kalmia sold to the United States under uniform deeds, wherein pertinent provisions are, Tr. 18, 26:

> "This Deed made this the 29th day of December, 1933, by and between Kalmia Realty and Insurance Company, a corporation, * * * party of the first part, and the United States of America, * * * party of the second part.
>
> "Witnesseth, that for and in consideration of the sum of One Dollar and Thirty-five Cents ($1.35) per

acre, cash in hand paid * * * the said party of the first part doth * * * sell and convey unto the said United States * * * the following described real estate and its appurtenances, lying and being in the County of Wayne, and the State of Mississippi;

* * * * * * *

"Said lands herein described containing in the aggregate 19,587.54 acres, * * *.

"Reserving, however, to the Kalmia Realty and Insurance Company, its successors and assigns, for a period of Ten (10) years from December 24, 1933, with extension as hereinafter provided, all oil, gas and other valuable minerals deposited in, on or under said tracts of land, with full right to it, its lessees, successors and assigns at any and all times during said period to enter upon said lands and to mine, to bore for and to remove oil, gas and other minerals of every description found therein or thereon.

"Provided; That if at the termination of the said ten year period of reservation it is found that such oil, gas, and other valuable minerals, mineral rights, and interests are being operated at any time during the preceding five years, to commercial advantage, then and in that event, the said right to mine and remove said oil, gas, and other valuable minerals, shall extend for a further period of five years, and further: That the right to mine and remove oil, gas, and other valuable minerals shall extend in periods of five (5) years whenever operation during the preceding five years has been for an average of 120 days per year throughout the period.

"Provided; Further, that the right or rights to mine and reserve oil, gas and other valuable minerals when extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit: December 24, 1943.

"Provided: That at the termination of the ten year period, if not extended, or at the termination of any extended period, in case the operation has been car-

ried on for the number of days and under conditions stated, the right to mine and remove oil, gas, and other valuable minerals shall terminate and a complete fee in the land become vested in the United States, and further,

"Provided: That the boring of wells and the mining and removal of oil, gas and other valuable minerals reserved to the vendor, its successors and assigns, shall be done strictly in accordance with the rules and regulations prescribed by the Secretary of Agriculture, which are as follows:

"1. Every person claiming the right to prospect for minerals, oil or gas or the products thereof, or to mine, drill, develop or operate in or upon lands acquired by the United States under the provisions of the Act of March 1, 1911 (36 Stat. 961), with a reservation to the grantor of mineral rights, including oil and gas, must, on demand, exhibit to the Forest Officer in charge, satisfactory written evidence of right or authority from, through, or under the said grantor.

"2. In prospecting for, and in mining and removing minerals, oils, and gas, and in manufacturing the products thereof, only so much of the surface shall be occupied, used or disturbed as is necessary for the purpose.

"3. In underground operations all reasonable and usual precautions shall be made for the support of the surface, and to that end tunnels, shafts, or other workings shall be subject to inspection and examination by the Forest Officers, Mining Experts, or Inspectors of the United States.

"4. Payment at the usual rates charged in the locality for sales of National Forest timber, and timber products of the same kind or species, shall be made to the United States for all timber, undergrowth or young growth, cut, destroyed, or damaged in prospecting, mining, drilling, or removing minerals, oil or gas, or in manufacturing products therefrom, and in the location and construction of buildings or works of

any kind for use in connection therewith. All slash resulting from such cutting or destruction shall be disposed of as directed by the Forest Officer when inflammable in his judgment. No timber, undergrowth, or reproduction shall be unnecessarily cut, destroyed, or damaged.

"5. All buildings, camps, equipment, and other structures shall be removed from the Forest within six months after the completion or abandonment of the operation, otherwise such buildings, camps, equipment, and other structures shall become the property of the United States.

"6. All destructible refuse caused by the operations hereunder, which interferes with the administration of the Forest or endangers forest growth, shall within six months after the completion of said operation be disposed of.

"7. While operations are in progress, the operators, contractors, subcontractors, employees of contractors and subcontractors at work on the National Forest shall use due diligence in the prevention and suppression of all fires, and shall be available for service in the extinguishment and suppression of all fires within the particular locality.

"The Said Kalmia Realty and Insurance Company for itself, its successors and assigns, doth covenant to and with the said United States of America, its successors and assigns (1) that it is seized and possessed of a good and valid fee simple title to the above described lands, (2) that it has the right to convey the same, (3) that the said United States of America shall have quiet and peaceful enjoyment of the same, (4) that the same is free and unincumbered except as hereinabove shown, (5) that it will execute such other and further assurances of title as may be necessary, and (6) that it will forever warrant and defend the title thereto against the lawful claims of all persons whomsoever."

Compare Findings of Fact and Conclusions of Law, Tr. 391:

"2. This case was filed June 12, 1946 by the Government of the United States against Kalmia Realty and Insurance Company, a corporation, and another, and in the complaint prayed that a decree be entered quieting the title in the United States to the land that is involved in this controversy, and to declare that the United States is the owner in fee simple and adjudging that the defendants have no right, title or interest therein, and to enjoin them permanently from asserting any claim or title thereto."

(This is inaccurate. Minerals alone, oil, were involved.)

"3. The controversy hinges to a large extent on the deed that was executed on December 29, 1933, by Kalmia Realty & Insurance Company, by which it conveyed to the Government of the United States large quantities of land located in Wayne and Jones Counties, Mississippi, * * *.

* * * * * * *

"5. The defense of the complaint, in the main, is based upon two grounds; (1) That fraud was perpetrated upon the representative of the grantor at the time and by the execution of the deed in question, such fraud alleged to have been perpetrated by the representative of the Secretary of Agriculture with authority to make such representations; and (2) that the operations upon said lands as provided for in the deed, were carried on within the 5-year period before the expiration of the ten years, to a commercial advantage and, therefore, that the grantor, Kalmia Realty & Insurance Company, was entitled to continue the operations as therein provided.

* * * * * * *

"8. The Court finds as a fact that Kalmia Realty & Insurance Company retained for a period of ten years all the gas, oil and valuable minerals deposited in, upon or under said tracts of land, with full right in itself,

its lessees or assigns at any and all times during said period to enter upon said lands and to mine, bore for and remove the oil, gas and other minerals of every description found therein or thereunder; * * *." (and other provisions as set forth above in the deed form).

"9. The Court finds that during the 10-year period and at the end of the 10-year period there was found no oil, gas or other valuable mineral or mineral rights had been operated within the past five years or that was in operation at the termination of the 5-year period.

"10. The Court finds that Kalmia Realty & Insurance Company did sell leases on said property and receive an amount of about $15,000 or $16,000 from said leases during the 5-year period preceding such termination, and its lessees entered upon said land and took cores and drilled holes to a depth of from 200 to 1,000 feet in various spots, and also there was drilled a well to a depth of over 2,000 feet, but no oil was found therein in commercial quantities. Geological tests showed that some of the grains of sand had oil on them, but it was never developed to commercial advantage and was abandoned as a dry well."

2. By uncontradicted testimony, that done during the last five year period may be thus epitomized, Testimony of Urban B. Hughes, Tr. 417:

"As the result of work carried on by the writer (Hughes), much valuable information was uncovered which added greatly to the prospects of finding oil in the area. In summary these were:

"1. A core drill survey which showed a favorable structure.

"2. A magnetic survey which indicated a geophysical prospect.

"3. The drilling of the Hill and Hill well which furnished an oil show.

"4. An indirect contact by Sinclair-Wyoming which Company did core drilling and seismic work, both showing structure.

"5. Sub-surface mapping of the area which also shows the area to be favorable."

On December 24, 1943, the Government ousted Kalmia and its lessees whose leases had not expired, and it forthwith made disposition to the major oil companies especially of the tract thus explored, and therefrom the United States, doing precisely that which Kalmia had done, received an estimated three quarters of a million dollars bonus for mineral leases plus the stipulated royalty. The District Judge held, as to that thus done, Tr. 397:

"2. The Court concluded as a matter of law that the language contained in the reservation of the oil rights and under the conditions therein provided means that there must have been oil or minerals mined and produced within five years prior to the termination of the 10-year period or at the time of the termination and that the leasing of the lands for exploration by the lessees was not a compliance with the provisions of the deed; and that, construing the deed in its entirety, giving effect to the language used, and in its ordinary and accepted terms, it was the intention of the parties to these documents that there must be a production of oils or minerals, or a well being drilled at the time in order to secure the benefits of the extended provisions."

Which, with deference, is fundamentally fallacious. Furthermore, the District Judge specifically excluded competent evidence tendered through witnesses to show misrepresentations by the government's representatives and substantially held

(a) That such fraud could not be made available as against the Government; and

(b) "9. The Court concludes as a matter of law that, even if proved, the misrepresentation which the Government's agent, Mr. Conarro, is charged with making, would not serve as a basis for voiding any part of the deeds to the United States because it dealt with a matter of law with which Kalmia was charged with notice and Mr. Conarro was not authorized to make any representations as to matters of law." Tr. 423.

Compare *United States v. Nebo Oil Co.*, 90 F. Supp. 73, 90:

"The general policy followed by the (National Forest Reservation) Commission was established at a meeting held on February 24, 1931. The pertinent portions of the minutes of that meeting read as follows:

" 'Secretary Wilbur stated that as he understood the general attitude taken by the Solicitor, and from the practicable standpoint, the acquisition of these outstanding mineral reservations is not a necessary feature of the acquisition of forest lands.

" 'Mr. Marshall said the Forest Service felt that the expense of setting up the machinery to condemn mineral rights would probably exceed any practicable benefits of that policy. He said that the Forest Service has had very little interference due to reservations.

" 'Secretary Wilbur asked if the Forest Service thought it would be impracticable to pursue such a policy.

" 'Mr. Kneipp stated that the original Weeks Law authorized and contemplated purchases subject to mineral reservations and the amendment of March 4, 1913, authorized purchases subject to mineral rights outstanding in third parties. The existing policy of purchasing lands subject to mineral reservations therefore is in full accord with legislative policy. Every effort is made to secure title free from reservations but that cannot always be done. Up to date the exercise of such rights has not unduly interfered with the use of the acquired lands for forest purposes and such interference as might occur is generally more than offset by cooperative benefits and savings in purchase price.

Unless lands are acceptable subject to mineral rights it would be very difficult to consolidate the Government holdings.

" 'Senator Keyes asked what the question before the Commission was and Secretary Hurley said he raised the question as to the policy of acquiring forest lands without the complete title in fee and the solicitor has now made a report in which he shows that the policy of buying lands with mineral reservations outstanding, has the sanction of law and has been heretofore considered the best policy. The question is now whether we are going to adopt the suggestion of the solicitor.

" 'Senator Harris expressed the opinion that the Commission should have the power to act on individual cases. In nine-tenths of the cases the land could be acquired without the mineral rights reserved. Where the mineral rights amount to a great deal, he did not think it is intended by law that the Commission should put the Government into the timber or mineral business, which would be using funds which should be put into the purchase of lands.

" 'A motion to continue the prevailing policy of buying lands subject to mineral reservations was moved by Secretary Wilbur, seconded by Senator Keyes and carried.'

"The question of acquiring lands subject to outstanding mineral reservations was again considered by the Commission at the meeting held on March 3, 1938, and the conclusions reached in 1931 were again restated."

Under Mississippi practice judicial notice of these records will be taken.

3. These lands were acquired under the Weeks Act, as amended, whose pertinent provisions hereasto are as shown in Appendix "B", but note especially, 36 Stat. 962, amended 43 Stat. 1215, Title 16 U.S.C.A., Sec. 516:

"The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as

> have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission. No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this section until the Legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. * * *."

4. Mississippi's consent statute, Section 4156, Mississippi Code of 1942, appears as Appendix "C".

5. The Legislature of Mississippi, being subject to the provisions of the Constitution of Mississippi, herein set forth in POINT II, subdivision VI, was wholly without power to surrender, if it so did, Mississippi's sovereign power of taxation, quo ad minerals so located as

(a) In no way to interfere with navigation; and
(b) In no way to interfere with reforestation; it being said in the *Nebo* case, supra, at page 99:

> "The Commission and the Department of Agriculture have repeatedly recognized that the ownership of the mineral rights by third persons will not interfere with the purposes for which the land was being acquired and have stated that the ownership of oil and gas rights by third persons are a positive benefit because they provide excellent fire control. * * *."

6. Assertion of the state sovereignty of taxation in rem against the minerals. These minerals were sold September 21, 1942, and thereasto the court held, Tr. 408:

> "* * * Had the surface and minerals been owned by private individuals under the same conveyance that is here in controversy, then, of course, the tax title as between private parties would have been good for the reason that under the law of Mississippi under a

recent decision of the Supreme Court of Mississippi" (*Hendrix* v. *Foote,* 205 Miss. 1, 38 So. 2d 111, See Appendix "D") "it was definitely held that the sale of minerals which had been assessed for taxes was valid and the validity of the assessment rolls of the county for the year wherein the taxes were assessed has been held valid as between private individuals, but under the law of the United States the interest of the United States in lands is not subject to taxation, as was held in the New Brunswick case, 276 U.S., * * *."

And, assuming to follow this decision, the District Court cancelled petitioners' title to the minerals. Thus sharply bringing to this Court for decision the defining of the boundary between the state's power of taxation, quo ad non-essential minerals, under the Weeks Act.

7. Petitioners contend that non-essential minerals underlying land acquired by the United States under the Weeks Act, especially the oil, remains subject to the paramount state sovereignty of taxation, and that this Court has impliedly, if not expressly, so determined. Compare *Wilson* v. *Cook,* 327 U.S. 474, 90 L. ed. 793; *Oklahoma Tax. Com.* v. *Texas Company,* 336 U.S. 342, 93 L. ed. 721.

8. The Court of Appeals and the District Court wrongfully failed to apply to the tax title the law as established impliedly, if not expressly, in this Court.

Questions Whereasto Certiorari Is Herein Sought

These questions are of such importance as demand certiorari, involving substantially (a) the Government; (b) oil; (c) State consent; and (d) State territorial taxing Power.

I. Rectification of conflict between (a) *State of Washington* v. *United States,* CCA 9th, 87 Fed. 2d 421, and

(b) the decision herein by the Court of Appeals for the Fifth Circuit requisite in this Court.

II. Oil underlying surface acquired under the Weeks Act remains subject to paramount state sovereignty and non-discriminatory ad valorem state tax thereon validly foreclosed vested title in petitioner, Hendrix, the power of Mississippi to impose ad valorem taxation supreme.

(a) Uniform coordination in this Court requisite under administrative policy of the National Forest Reservation Commission which, with deference, contravenes expressly the decisions below that leasing in standard form with actual prospecting done constitutes a commercial advantage. Compare *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73; but if therein as to the estate we err, then

(b) The maximum property vested in the government being a possibility of reverter with no vested estate in the minerals state sovereignty sufficient to divest such possibility. Under the original reservation Kalmia had the unquestioned right to remove all oil, being possessed thereof as of a determinable fee, the tax sale thereof valid. See Point II, subdivision II.

(c) Assuming for the sake of argument that the United States had obtained a vested estate in the oil under the Weeks Act, still such an estate as to oil was held not in a Governmental capacity but in a private capacity and being so held was subject to divestiture through foreclosure of paramount state ad valorem tax lien. See Point II, subdivision III.

(d) Under the Weeks Act the United States has consented, if this be essential, to ad valorem taxation of oil reservations. See Point II, subdivision IV.

(e) Mississippi's sale of minerals, including oil, to pay for defaulted ad valorem non-discriminatory tax, valid. See Point II, subdivision V.

(f) The legislature of Mississippi prohibited from consenting that the United States might acquire the oil and, quo ad the oil, the assumed consent of the Legislature a nullity. See Point II, subdivision VI.

(g) Wherever in Mississippi, there is a statutory power vested in a board of limited and special jurisdiction, it must act by its minutes and its minutes must affirmatively disclose the jurisdiction. A failure so thus to do invalidates. See Point II, subdivision VII.

III. The Weeks Act, if it embraced the acquisition of severed minerals, was unauthorized by the Federal Constitution. See Point III.

IV. Property in oil is admeasured by state, not federal, law. See Point V.

V. Under the reservation of the oil, under a deed prepared by the government, underlying Weeks land, with the policy of the National Forest Reservation Commission thereasto, the provision in the deed requiring "it be found" in order to effectuate further renewals, by reason of the United States not being suable and the other reasons hereinabove set forth, made the provisions in the deed covenants compensable in damages not conditions whereunder forfeiture might be. See Point VI.

VI. The Court of Appeals in the Fifth Circuit in holding Kalmia not entitled to rely upon representations of government officials as to the extent of the provisions to be contained in the deed and excluding as incompetent evidence tendered, established a rule (a) contrary to the rule in this Court, *Bull* v. *United States,* 295 U.S. 261, 79 L. ed. 1421;

(b) contrary to the rule in the Second Circuit and others, *Staten Island Hygeia Ice & Cold Storage Co.* v. *United States,* 85 Fed. 2d 68; and (c) contrary to the law as announced by the Supreme Court in the State of Mississippi. See Point VII.

VII. Provisions in reservation deleted by regulation of Donald M. Nelson and by the petroleum administrator after execution of the alleged reservation. See Point VIII.

VIII. The Weeks act and the public policy of the National Forest Reservation Commission thereasto, petitioners' representatives were actually deceived by those things to them told and having so been, thereasto were entitled to relief. See Point IX.

IX. The Legislature of Mississippi prohibited from consenting that the United States might acquire the oil and, quo ad the oil, the assumed consent of the Legislature a nullity. See Point X.

X. Wherever in Mississippi, there is a statutory power vested in a board of limited and special jurisdiction, it must act by its minutes and its minutes must affirmatively disclose the jurisdiction. A failure so thus to do invalidates. See Point XI.

Reasons Why Certiorari Should Be Herein Granted

As immediately heretofore shown:

(a) The Court of Appeals in this cause decided an important question of Federal procedure directly in conflict with the rule as established in the Ninth Circuit and elsewhere applied and a reconciliation hereasto is essential.

(b) The Court of Appeals herein decided a very important Federal question as hereinabove shown in conflict

with (1) the opinions of this Court; (2) the opinions on the precise point in other Circuits; and (3) in conflict with the established law in the State of Mississippi.

(c) The admeasurement of Mississippi's power to tax oil under mineral reservations where surface has been acquired by the Government is, as above shown, a vital issue solely solvable herein and of the utmost national importance for appropriate preservation of the dual system of government.

(d) The Court of Appeals of the Fifth Circuit in affirming the District Judge held petitioners not entitled to asserted fraud as against the Government, with deference, in palpable conflict with (1) the decisions here; (2) decisions in other Circuits; and (3) decisions in the State Supreme Court.

(e) And for other causes apparent to this Court and not more specifically assigned than is hereinabove done.

Petitioners attach to this petition a certified copy of the transcript of the record of the United States Court of Appeals, and upon presentation of the petition have furnished ten copies of the record as printed in the United States Court of Appeals, Fifth Circuit, with proceedings and opinions in that court.

Wherefore, petitioners pray for a writ of certiorari from this Honorable Court directed to the United States Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court for its review and determination, on a day named therein, a full and complete transcript of the record and all of the proceedings in the case of *Kalmia Realty & Insurance Company* v. *United States*, No. 12,965, on the docket of the court, and that the judg-

ment of said court may be reversed, and appropriate rectification here had.

JUDGE BEN STEVENS,
Hattiesburg, Mississippi;
J. R. BUCHANAN,
L. BARRETT JONES,
Jackson, Mississippi;
WALTER S. WELCH,
GARNER W. GREEN,

WELCH, COOPER & WELCH,
Laurel, Mississippi;
BUCHANAN & MONTGOMERY,
Laurel, Mississippi;
GREEN, GREEN & CHENEY,
801 Standard Life Building,
Jackson, Mississippi,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 247

KALMIA REALTY & INSURANCE COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

BRIEF FOR PETITIONERS

Opinions Below

There is no opinion by the District Judge but findings of fact and conclusions of law are printed Tr. 391, 407 and 421. The opinion of the Court of Appeals filed May 15, 1950, is reported *Kalmia Realty & Insurance Co.* v. *United States of America,* 181 Fed. 2d 598, is in the record at page 444 and is made Appendix "A" to this brief.

Basis for Jurisdiction

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at page 1 of the foregoing petition and is by reference adopted as a part of this brief.

Statutes Involved

Those herein set forth.

Statement

The material facts have been set forth in the summary statement at pages 1-12 et seq., of the preceding petition and such statement is by reference adopted as part of this brief.

ARGUMENT

Point I

Rectification of Conflict Between (a) State of Washington v. United States, 87 Fed. 2d 421, CCA 9th, and (b) the Decision Herein by the Court of Appeals for the Fifth Circuit Requisite in This Court.

1. The District Court specifically found jurisdiction (Tr. 391) affirmed by the Court of Appeals (Tr. 445).

2. Where either equity jurisdiction is lacking (*Hipp* v. *Babin,* 19 How. 278, 15 S. Ct. 633), or Federal diversity jurisdiction does not appear (*Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 86 L. ed. 47), sua sponte the court will act (*State of Texas* v. *State of Florida,* 306 U. S. 398, 83 L. ed. 817; *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.,* 306 U. S. 563, 83 L. ed. 987).

3. The conflict between the Ninth Circuit and the Fifth Circuit:

(a) In 87 Fed. 2d at page 423, it is said:

> "Suit by the United States against the Columbia River Packers Association and others, in which the States of Washington and Oregon filed motions for leave to intervene. From a decree for plaintiff (U. S. v. Columbia River Packers Ass'n, 11 F. Supp. 675), the

defendants appeal, and from orders denying their respective motions for leave to intervene, the States of Washington and Oregon separately appeal."

Therein there was a lease by the State, and the United States sought cancellation without the State, lessor, being thereto a party, whereof the Ninth Circuit thus held:

> "If we accept this statement that the decree decided the title to the property, it is apparent that in the instant case, appellant State of Washington, is an indispensable party. To test the soundness of this rule, it is well to consider what happens when a term for years is granted. When an estate for years is granted, the grantor divests himself of the right of possession for the term specified. At the end of that term this right of possession passes or reverts to the grantor by operation of law—a process which is called 'reversion'. * * *.
>
> * * * * * * *
>
> "The right of possession having been granted by the grantor, the latter, of course, does not again acquire that right until the term, for which he has granted it, terminates. Such right of possession, upon termination of the term, then reverts to the grantor. While this right of possession is in the lessee, a decree, in a suit brought against the lessee by a third party adjudicating that such lessee has no title or right of possession, because his grantor had none to convey to him, directly adjudicates against that right, by adjudicating that such right of possession was in neither the lessor nor the lessee. The lessor is affected (not in the sense that he is concluded by the decree as res adjudicata), because the thing, which he claims he owned at the time of the grant to the lessee, and which he claims will revert to him is declared by the decree to be non-existent. Such a decree then does have an effect on the lessor's rights, for at the termination of the term, under the decree the right of possession could not revert to the lessor."

Compare *Delno* v. *Market St. Ry. Co.*, 124 Fed. 2d 965, 968, C. C. A. 9th, where that wherefor we herein contend was accurately epitomized.

(b) This rule, though approved widely, was herein denied application when the United States, after making commercial leases for oil to the major oil companies, alone brought suit against the defendants, Kalmia and Hendrix to confirm the entire mineral estate, just as it had done in the *Washington* case, *supra.* As at the date of the institution of this suit, the property rights (if the United States was the owner of the oil, which we deny) are thus defined by Mississippi's court in *Koenig* v. *Calcote,* 199 Miss. 435, 25 So. 2d 763, 766:

> "* * * when the Calcotes executed the oil and gas leases in favor of the Sun Oil Company they had left in them, first, a reversionary fee interest in the oil, gas and other minerals, if and when the oil and gas lease should 'for any reason' become canceled or forfeited, second the right to receive the rentals and royalties during the life of the lease * * *."

But, as further therein defined, the lessees (these major oil companies) claim a determinable fee in the minerals whereasto alone this controversy is, and the mineral estate thus claimed to be vested might be at the pleasure of the lessee worked to exhaustion, as said in the *Koenig* case at page 765:

> "* * * Said conclusions also fail to take into account the fact that the estate held by the Sun Oil Company at the time of the execution of the deed was a determinable fee, Lloyd's Estate et al. v. Mullen Tractor & Equip. Co., 192 Miss. 62, 4 So. 2d 282, * * *."

See, also, *Gulf Refining Co.* v. *Stanford,* 202 Miss. 602, 30 So. 2d 516; *Bailey* v. *Federal Land Bank of New Orleans,* 207 Miss. 764, 43 So. 2d 375; *Calcote* v. *Texas Pacific Coal & Oil Co.,* 157 Fed. 2d 216, C. C. A. 5th. This interpretation

of estates in land by the state supreme court is conclusive here. Compare *Edward Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458, 69 L. ed. 1050; *Memphis Natural Gas Co.* v. *Stone,* 335 U. S. 80, 92 L. ed. 1832; *International Union of U. A. A. & A.* v. *O'Brien,* — U. S. —, 94 L. ed. 559, 660; *International Oil Pipe Line Co.* v. *Stone,* 337 U. S. 662, 93 L. ed. 1613.

4. So, when the United States instituted this action to recover the minerals whereasto this controversy is, it affirmatively appears:

(a) That before the institution of this suit the United States had conveyed a determinable fee through the leases to these several oil companies and had given the right of unconditional user and thereafter could possess only a possibility of reverter, whereunder it might not sue to recover that it had conveyed to another, but of course might protect its delay rental and royalty. Compare *Finkbine Lumber Co.* v. *Saucier,* 150 Miss. 446, 116 So. 736, 737; *Smith* v. *Salmen Brick & Lbr. Co.,* 151 Miss. 329, 118 So. 179; *Minor on Real Property,* Vol. 1, Sec. 780, p. 1012.

Compare, also, *Prall* v. *Burckhartt,* 299 Ill. 19, 132 N. E. 280, and Annotation 18 A. L. R. 1008, subsection II; *Richardson* v. *Holman,* — Fla. —, 30 So. 2d 641. See, also, 31 *C. J. S.,* "Estates", Sec. 105, p. 125, referring to and approving 21 *C. J.* 1017.

Therefore, while this possibility of reverter of the minerals thus conveyed after a determinable fee is presently alienable under Mississippi statutes as an "interest", its fundamental nature of not being an estate—of being wholly contingent, of being destructible by legislation—continuously remains. Compare 33 *Am. Jur.,* p. 683. So that, quo ad the oil, the United States, after these leases, had not that which is here in controversy—there is no controversy other or further—only a possibility of reverter with royalty reser-

vation, and having such a right is subject to those disabilities of suing thereon inherently incident. These major oil companies who possess under this deed this mineral fee are surely indispensable parties.

(b) Conversely, these major oil companies owning this determinable fee have that which in the above quoted cases under a rule of property—(*Wisconsin Lumber Co.* v. *State,* 97 Miss. 571, 54 So. 247; *Forest Product & Mfg. Co.* v. *Buckley,* 107 Miss. 897, 66 So. 279)—constitutes the entire title to the minerals, except, of course, possible royalty when, if and after production is struck. These major oil companies, quo ad the oil, claimed to have the exclusive right to enter, produce and remove, accounting after production to the United States only as to a royalty. On an arbitrary basis, therefore, we may assume and so do that the interest claimed to be in the major oil companies is at least 7/8ths with right of possession, and in the United States 1/8th without the right of possession, and so having, are not presently in any way before the Court.

Petitioners do not controvert Federal jurisdiction so far as the rights of the United States, as plaintiff properly suing, are concerned, but when the fee is vested with the exclusive right of possession under these leases in these major oil companies, there is no jurisdiction shown in the District Court by reason of diversity or a Federal question not therein appearing, for as to this mineral fee these major oil companies may not sue in the Federal court as a matter of right unless there be diversity or other basis for Federal jurisdiction (*Skelly Oil Co.* v. *Phillips Petroleum Co.,* — U. S. —, 94 L. ed. 845), and when the District Court confirmed in the United States the entire mineral fee, it committed a palpable error, when it knew that as to a determinable fee in the oil with an exclusive right to develop these major oil companies claimed to be the owners thereof. With deference, the District Judge and the Court of Appeals

flagrantly departed from the proper rule established in the Ninth Circuit. The extent of the major oil companies' claimed ownership appears in the exhibits transmitted with the record.

Point II

Oil Underlying Surface Acquired under the Weeks Act Remains Subject to Paramount State Sovereignty and Non-Discriminatory Ad Valorem State Tax Thereon Validly Foreclosed Vested Title in Petitioner, Hendrix, the Power of Mississippi to Impose Ad Valorem Taxation Supreme.

(a) The Weeks Act (March 1, 1911, Ch. 186, 36 Stat. 961-963, as amended, 37 Stat. 855, 38 Stat. 441, 43 Stat. 654, 43 Stat. 1215, and 49 Stat. 1225, Title 16 U. S. C. A., Secs. 480, 500, 513-519, 521, 552 and 563, hereinafter called "Weeks Act"). Herein, we make no challenge as to the constitutionality of this act insofar as and to the extent that it covers (a) timber, (b) surface, and (c) all factors essential to regulate navigation, but if the act be construed as to the sovereign taxing power of the State to cover a reservation in the underlying oil in no way within the purpose of the Act, then thereasto as against the State's sovereign taxing power this Act is void.

(b) But properly construed and as held by this Court, the Weeks Act as to oil leaves state sovereignty unimpaired.

The District Judge invalidated Hendrix's title to the oil solely under *New Brunswick* v. *United States,* 276 U. S. 547, 72 L. ed. 693, wherein the United States under the war power had acquired, presumptively with the consent of New Jersey, certain lots whereon dwellings were erected to effectuate the war effort. Thereafter, on dissolution these lots were sold substantially with a deed to the purchaser with the reservation of a paramount lien to the United States to secure the unpaid balance, and as to (a) land, and (b) the war power, this Court held that, quo ad

the unpaid purchase money, there might not be a foreclosure of the tax lien unless and except the same fully protected the Government. Substantially reaffirmed in *S. R. A.* v. *Minnesota,* 327 U. S. 558, 90 L. ed. 851. See, also, *West* v. *Oklahoma Tax Com.,* 334 U. S. 723, 92 L. ed. 1680; *United States* v. *Allegheny County,* 322 U. S. 174, 88 L. ed. 1209.

But, with deference, these cases are neither controlling nor persuasive because this Court recognizes the increasing social demands upon the states and that their sole recourse for the protection and welfare of the citizens is the taxing power. Compare *Oklahoma Tax Commission* v. *The Texas Company,* 336 U. S. 342, 93 L. ed. 721, whereasto it was declared, p. 736:

> "'• • • In the light of the expanding needs of State and Nation, the inquiry has been pressed whether this conclusion has adequate basis. . . .' 303 U. S. at 384."

The demarcation between national sovereignty and state sovereignty, quo ad taxation of oil, presents a question on the constitutional level, and as to the conflict between these sovereignties this Court there declared in the *Oklahoma* case, page 732:

> "Our present problem lies on the constitutional level. It requires reconsideration of former decisions specifically in point, together with later ones deviating in rationale. It is of substantial importance both for the states' powers of taxation and for the subjects on which they may impinge. Moreover, even though the immediate questions are closely related to federal policies concerning Indian Lands, they are equally tangent to considerations affecting other types of situations raising questions of immunity."

This Court further therein declared (p. 732):

> "It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its for-

merly prevailing ideas concerning the breadth of so called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large both aspects, represents a rising or expanding curve tapering off into a falling or contracting one."

This Court said in *West* v. *Oklahoma Tax Commission,* 334 U. S. 723, 92 L. ed. 1680:

> "Since 1819, when M'Culloch v. Maryland, 4 Wheat (U. S.) 316, 4 L. ed. 579, was decided, it has been established that the property of the United States is immune from any form of state taxation, unless Congress expressly consents to the imposition of such liability. * * *".

As was said by Mr. Justice Black in *Mulane* v. *Central Hanover Bank & Trust Co.,* — U. S. —, 94 L. ed. 578, 582:

> "The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, * * *."

The status of oil as property is almost a complete anomaly under the common law and whether this Court will hold (a) that its status must be determined under the Federal law (*United States* v. *Nebo Oil Co.,* 90 F. Supp. 73) or (b) under the law of Mississippi (*Merrill Eng. Co.* v. *Capital Nat. Bank,* 192 Miss. 378, 5 So. 2d 666; *Stokely* v. *State,* 149 Miss. 435, 115 So. 563), is as yet not definitely settled as to the Weeks Act though thereunder the United States has acquired in Mississippi 1,003,215 acres, Tr. 96, and has exercised power under this statute in forty-one of the states, and yet the status of this most important war material, oil, has not been adjudicated. Compare *Rist* v. *Toole*

County, — Mont. —, 159 P. 2d, 340, 162 A. L. R. 402; *Calahan* v. *Martin*, 3 Cal. 2d 110, 43 P. 2d 788, 101 A. L. R. 872; *McIntosh* v. *Vail*, 126 W. Va. 395, 28 S. E. 2d 607, 151 A. L. R. 804; *Toothman* v. *Courtney*, 62 W. Va. 177, 58 S. E. 915; and *Gulf Refining Co.* v. *Stone*, 197 Miss. 713, 21 So. 2d 19. But see *Hendrix* v. *Foote*, 205 Miss. 1, 38 So. 2d 111, Appendix "D".

I. Uniform Coordination in This Court Requisite under Administrative Policy of the National Forest Reservation Commission Which, With Deference, Contravenes Expressly the Decisions Below That Leasing in Standard Form With Actual Prospecting Done Constitutes a Commercial Advantage.

As epitomized in *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73, it was as to the policy of the United States under the Weeks Act properly judicially held:

(a) Congress did not appropriate a single cent for mineral acquisition.

(b) As to the authority of the Secretary, that court said (p. 86):

> " 'The first question which therefore arises is as to whether large investments in mineral values would be in accord with the purpose and intent of the Weeks Law (16 U. S. C. A. Secs. 480, 500, 513 et seq., 521, 552, 563) and Clarke-McNary Law (16 U. S. C. A. Secs. 471, 505, 515, 564 et seq.) which primarily were designed to promote the protection of navigable streams and the production of timber supplies. With practically limited appropriations available for purchase work and with the acquisition requirements largely in excess of the available appropriations, every dollar expended in payment for mineral values would be one dollar less available for the purchase of lands to carry out the primary purposes of the Acts and appropriations. One

logically may inquire whether in the event Federal acquisition of mineral deposits is deemed desirable, the cost of their acquisition should not be borne by other appropriations'."

(c) The retention of the minerals by the original owner is not contrary to the spirit of the Act, but in general (90 F. Supp. 86):

" 'So far as can be foreseen, the net effect accruing from the exercise of the retained mineral rights will generally be beneficial rather than detrimental to good forest management. Oil and gas development in the Allegheny Purchase Area seldom involves the withdrawal from timber production of more than one per cent of the surface, much of this is carefully cleared and patrolled pipe-line rights-of-way. The fire preventive measures of the oil men contribute more to timber production than would the use of the small surface areas they occupy. * * *'."

(d) Herein the cash consideration was only $1.35 per acre against the average figure in Mississippi of $3.53 per acre for 1,003,215 acres wherein was included 18,000 acres of timber at $42.81 per acre, Tr. 96.

(e) In many instances reservations of the minerals in fee were allowed without question when insisted upon, and that here requisite is the fitting of the statute into the picture perfected by the interpretation of the National Forest Reservation Commission. Under the Weeks Act, as implemented by the National Forest Reservation Commission, the inferior courts have not correctly as to Kalmia vouchsafed that whereto as a citizen it was in good faith entitled to at the hands of a government at war. We animadvert, with deference, the responses made by the government to the interrogatories propounded, clearly concealing the uniform policy of the government of vouchsafing mineral reser-

vation to the land owner when such land owner insisted upon it. Tr. 80-97.

(f) The evidence in this record is uncontradicted, with deference, that Kalmia and those claiming under it thus did assert the right to retention of the minerals but under overwhelming pecuniary pressure were compelled to accede to the demands of the local Forestry representatives who were unwilling to give that whereto Kalmia was lawfully entitled—mineral reservation in fee—and it thus becomes absolutely imperative that this Court fit this reservation into the terms of the statute as interpreted by, not the local representative, but by the National Forest Reservation Commission itself, and thus interpreting, with deference, commercial advantage unquestionably occurred with an extension certainly for a period of five years. Compare 2 *Summers Oil and Gas,* Ch. 10, Sec. 301, p. 159; *Continental Oil Co.* v. *Osage Oil & Refining Co.,* C. C. A. 10th, 69 Fed. 2d 19, 23, wherein it is said:

> "Where the lessor refuses to give possession to the lessee or wrongfully obtains an injunction against the lessee restraining operations on the land, it has been held that the definite term will be treated as extended for the length of time that the lessee is thus kept out of possession or restrained from operations by the wrongful act of the lessor. Stahl v. Van Vleck, 53 Ohio St. 136, 41 N. E. 35; Standard Oil Co. of La. v. Webb, 149 La. 245, 88 So. 808.
>
> "The conduct of the lessor may create an estoppel which will preclude him from asserting a termination of the lease because of non-production at the expiration of the definite term. Ohio Fuel Oil Co. v. Greenleaf, 84 W. Va. 67, 99 S. E. 274; Hodges v. Miller (Tex. Civ. App.), 244 S. W. 634."

See, also, *Smith* v. *Salmen Brick & Lbr. Co.,* 151 Miss. 329, 118 So. 179; therein having been of counsel the record shows

a denial of the land owner of the right to remove the timber with skidders wherefor there was such right and the court upon the right being denied by the land owner extended the term. Herein, the United States being at war, it would have been substantially treason to have defied the Government at the time it took possession. The lower courts held notwithstanding the interpretation by the National Forest Reservation Commission (which interpretations were not submitted to the Court of Appeals by reason of the manner in which the interrogatories were answered) and had this interpretation by the Commission been submitted to the courts, it well may have been that they would not have taken the view that "commercial advantage" required actual production, especially as these lands were under lease by Kalmia with the right in the lessee to enter and drill, the deed specifically providing that if drilling were being had at the expiration date extension, per se, occurred. In view of the administrative determination by the National Forest Reservation Commission, the construction by the Court of Appeals of the reservation amounted to a crucifixion. It took from Kalmia that wherefor the Government had not paid and whereasto full title with plenary removal rights was specifically reserved to be retained by Kalmia without interference by the Government and when Kalmia was doing and had done precisely that subsequently done by the United States, the receipt of $15,311.70 was unquestionably a commercial advantage extending the time.

II. Under the Original Reservation Kalmia Had the Unquestioned Right to Remove All Oil, Being Possessed Thereof as of a Determinable Fee, the Tax Sale Thereof Valid.

For the oil, the United States had paid naught and as owner Kalmia might have executed a perpetual oil lease

reserving a fixed rental payment. Compare *Lloyd's Estate* v. *Mullen Tractor & Equip. Co.,* 192 Miss. 62, 4 So. 2d, 282, approved in *Koenig* v. *Calcote,* 199 Miss. 435, 25 So. 2d 763; *Anderson* v. *Sun Oil Co.,* — Miss. —, 42 So. 2d 238. Under this reservation with this right of absolute removal without impinging upon the right of the United States, thereasto Kalmia possessed the mineral fee and the United States possessed a possibility of acquisition after Kalmia had exercised its paramount property rights. As was said in *Finkbine Lumber Co.* v. *Saucier,* 150 Miss. 446, 116 So. 736, 737:

> "Under the deed by which the appellees conveyed the timber to Field, they had a possibility of reacquiring the timber by its reverting to them in event it should not be cut and removed from the land within the time limited in the deed therefor. Ladiner v. Ingram Day Lumber Co., 135 Miss. 632, 100 So. 369. It is true that this possibility, known as 'possibility of reverter' (Crorow Hardwood Co. v. Burks (Miss.), 115 So. 585; Memphis & Charles R. R. Co. v. Neighbors, 51 Miss. 412; Vicksburg & Meridian Railroad Co. v. Ragsdale, 54 Miss. at page 216) was a bare possibility, and not one coupled with an interest (Challis's Real Property (3d Ed.) note on page 76), and therefore inalienable at common law. * * *."

Approved in *Sumter Lumber Co.* v. *Skipper,* 183 Miss. 595, 184 So. 302.

Where there is complete ownership of the oil in Kalmia with plenary power to remove and only a possibility of reverter in the United States, the state's taxing power, quo ad Weeks Act mineral reservations, is supreme. Compare *United States* v. *Burnison,* 338 U. S. 87, 94 L. ed. 433, 436, wherein it is said:

> "The Fox Case is only one of a long line of cases which have consistently held that part of the residue

> of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property *and the power to determine who may be made beneficiaries.* It would be anomalous to hold that, because of an *amorphus doctrine* of national sovereignty, federal constitutional law reached into a California statute and made impotent that state's restrictions on the designation of beneficiaries." (Emphasis ours.)

See, also, *United States* v. *Fox,* 94 U. S. 315, 24 L. ed. 192.

By Section 112 of Mississippi Constitution, fundamentally altering the Constitution of 1869, it was explicitly provided:

> "Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. * * * Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. * * * But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county."

And in Mississippi the proceeding is in rem. Compare Mississippi Code of 1942, Section 9744. A tax sale pursuant thereto divests contingent interests. Compare *Merrill Eng. Co.* v. *Capital Nat. Bank,* 192 Miss. 378, 5 So. 2d 666, approving *Jackson* v. *Ashley,* 189 Miss. 818, 199 So. 91.

Thus when the United States only possessed this possibility of a reverter with the entire beneficial interest vested in an individual, it was competent for Mississippi to sell for a default in payment of its taxes that thus individually owned. Compare *United States* v. *County of Allegheny,* 322 U. S. 174, 187, 88 L. ed. 1209, 1219, wherein it is said:

> "* * * We have held that where private interests in property were so preponderant that all the Govern-

ment held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. Northern P. R. Co. v. Myers, 172 U. S. 589, 43 L. ed. 564, 19 S. Ct. 276; New Brunswick v. United States, 276 U. S. 547, 72 L. ed. 693, 48 S. Ct. 371. * * *".

Compare *United States* v. *Kansas City Life Ins. Co.*, — U. S. —, 94 L. ed. 896, 905, in the dissenting opinion, Mr. Justice Minton said:

"'* * * not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.' United States v. Willow River Power Co., 324 U. S. 499, 502, 89 L. ed. 1101, 1107, 65 S. Ct. 761."

See, also, 33 *Am. Jur.*, p. 683, wherein it is said:

"* * * It seems that a mere possibility of reverter may be defeated by statute, because such possibility of reverter, being a mere expectation of property in the future, is not a vested right, and may be changed, modified, or abolished by legislative action."

Compare 31 *C.J.S.*, "Estates", Sec. 105, p. 125.

This deed must be construed in the light of the purpose of the Act whereasto it was said in *United States* v. *Nebo Oil Company*, 90 F. Supp. 73, 99:

"* * * Commission has taken the position that it is not authorized to purchase minerals with funds appropriated for the purchase of lands for forest purposes.

"The Commission and the Department of Agriculture have repeatedly recognized that the ownership of the mineral rights by third persons will not interfere with the purposes for which the land was being acquired and have stated that the ownership of oil and gas rights by third persons are a positive benefit because they provide excellent fire control. * * *."

So, when Kalmia owning absolutely the oil defaulted in the payment of the tax imposition made by Mississippi hereasto and Hendrix purchased all the oil under a perfect title by a proceeding in rem, the fact that the United States owned the surface and timber and Hendrix under the state sale owned the oil with a right to remove it without impairing the United States' rights in the surface (compare *McNeese* v. *Renner,* 197 Miss. 203, 21 So. 2d 7; *Pace* v. *State,* 191 Miss. 780, 4 So. 2d 270), there was as between the sovereignties presented a not unusual condition and one in which the United States was not authorized to forfeit the foreclosure title vested by the State of Mississippi for a mere failure to remove within the time required the oil therefrom. Compare *Peterson* v. *Gibbs,* 147 Cal. 1, 81 Pac. 121, wherein it is said:

> "Here there is absolutely nothing in the terms of the agreement which can be construed as making the removal of the timber a condition precedent to the passing of the title, or in case delay in such removal, beyond the period of ten years from the date of the instrument, or a failure to pay the rental reserved or one-half of the taxes, to operate as a divesting of the title conveyed. The terms of the instrument literally signify as absolute conveyance of timber, and there is nothing in the provisions relied upon by the plaintiff to impair the plain words of the present grant."

In *Halstead* v. *Jessup,* 150 Ind. 87, 49 N. E. 821, it is said:

> The law does not favor forfeitures and will not enforce them in the absence of clearly stated conditions of forfeitures. Here, as we have stated, there is no stated condition of forfeiture. If by delay in taking the timber, after the period named, damage would accrue to the owner of the land, it would not be questioned that such damage could be recovered, but it would be manifestly unjust that mere delay should forfeit both appellant's money and his timber, and that

> the appellee should become the owner of the timber upon the strength of an implied forfeiture."

Compare *Alexander* v. *Bauer,* 94 Minn. 146, 102 N. W. 388; *Irons* v. *Webb,* 41 N. J. L. 204; *Mathews* v. *Mulvey,* 38 Minn. 342; *Stuckley* v. *Butler,* Hob. 300; *Gregg* v. *Birdsall,* 53 Barb. 405; *Paterson* v. *Graham,* 164 Pa. St. 241; *Knotts* v. *Hydrick,* 12 R. Law. 314; *Johnson* v. *Truitt,* 122 Ga. 327, 50 S. E. 136; *Peace* v. *Gibson,* 6 Me. 83; *Howard* v. *Lincoln,* 12 Me. 122; *Davidson* v. *Moore,* 37 S. W. 206; *Hoit* v. *Stratton Mills,* 54 N. H. 109.

In this aspect, the purchaser was entitled to a judicial hearing as to whether or not the receipt of $15,311.70 and the method of working constituted a "commercial advantage", compare *Wisconsin Elec. Power Co.* v. *United States,* 336 U. S. 176, 93 L. ed. 591, and before the United States might take from Hendrix that precedently in him vested it was requisite that hereasto he be vouchsafed a judicial hearing. Compare *Mulane* v. *Central Hanover Bank & Trust Co.,* — U. S. —, 94 L. ed. 578, 583, wherein it is said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

And yet herein the United States was not subject to suit. Compare *Perry* v. *United States,* 294 U. S. 330, 79 L. ed. 912. Yet Hendrix was entitled under the Fifth Amendment to this protection and being so thus entitled the deed could only be made law conforming by construing the provisions hereasto, if essential, as covenants and not conditions, and this, Mississippi's law required. Compare *Memphis & Charleston R. R. Co.* v. *Neighbors,* 51 Miss. 412, 418:

> "A court of equity declines to lend its aid to enforce a forfeiture. Judge Story lays down the doctrine

broadly, 'that it will never enforce either a penalty or a forfeiture'; and adds, 'therefore it will never aid in the divestiture of an estate for a breach of a covenant on a condition subsequent, although it will often interfere to prevent the divestiture of an estate for a breach of covenant or condition. 2 Eq. Jur., Sec. 1319. In the case of Livingston v. Tompkins, 4 Johns. Ch. 430, Chancellor Kent declared it was 'contrary to the uniform course of the court and its established principles to aid in divesting an estate for breach of condition subsequent.' "

Compare *Natchez* v. *Thornton,* 88 Miss. 1, 41 So. 498; 4 *Thompson on Real Property,* Sec. 2044, p. 571.

Additionally, the District Judge and the Court of Appeals held the provision herein as to the location of the well and twenty-five acres thereabout void, and under *Ates* v. *Ates,* 189 Miss. 226, 196 So. 243, where the exception is void, the estate is not divested. So that when, under these circumstances, the entire estate in the minerals being individually vested on September 21, 1942 in Kalmia and the paramount lien of the state *in rem* being thereasto exercised, an unconditional fee in that vested in Kalmia passed to Hendrix and thereasto the United States should have been content with that provision made by the Secretary and integrated into this deed providing, Tr. 24:

"2. In prospecting for, and in mining and removing minerals, oils, and gas, and in manufacturing the products thereof, only so much of the surface shall be occupied, used or disturbed as is necessary for the purpose."

And any provision integrated into this deed in conflict therewith might well here be regarded as void. Compare *Chapman* v. *Sheridan-Wyoming Coal Co.,* 338 U. S. 810, 94 L. Ed. 307, 312:

"The only claim of law violation is that the Secretary is proposing to violate his own regulation, promul-

gated pursuant to the Act and hence having the force of law. That it binds him as well as others while it is in effect is not doubted."

The effect of the provisions by Donald M. Nelson, Director of Priorities, and of the Petroleum Administrator will be later more fully developed by integrating these as well as the interpretation made in *Wilson* v. *Cook,* 327 U. S. 474, 90 L. Ed. 793, and the express terms of Sec. 486, Title 16 U. S. C. A., "National Forests".

We do assert that the title of Hendrix was absolute. In fairness to the District Judge he did on the bench express serious doubt as to the correctness of his decision hereasto and we, with deference, submit that when this sale was made the fee vested in Hendrix under the state's sovereign taxing power.

III. Assuming for the Sake of Argument that the United States Had Obtained a Vested Estate in the Oil under the Weeks Act, Still Such an Estate as to Oil Was Held Not in a Governmental Capacity But in a Private Capacity and Being So Held Was Subject to Divestiture Through Foreclosure of Paramount State Ad Valorem Tax Lien.

The United States claimed solely under the Weeks Act, Tr. 81. Compare *Wilson* v. *Cook,* 327 U. S. 474, 90 L. Ed. 793. The United States as a nation might make acquisitions of land for other than the purposes prescribed in Art. 1, Sec. 8, subsection 17, of the Constitution, *Collins* v. *Yosemite Park & Curry Co.,* 304 U. S. 518, 82 L. Ed. 1502, but subject to the rights prescribed in the consent given by the State, and assuming said consent of Mississippi to have been validly given (for consent statute, see Appendix "C"), which we question, the United States, *quo ad* the oil, was engaged in a private—non-governmental—business enter-

prise with profit as an incentive. That being done varied naught from that which might have been done by a private oil company under its *dominium* but subject to the *imperium* of the sovereign State, and so when the United States was thus engaged in that which was strictly a non-governmental but competitive commercial enterprise thereasto Mississippi sovereignty rendered the Government's property amendable to its tax laws. Compare *South Carolina* v. *United States*, 199 U. S. 437, 50 L. Ed. 261, 264, wherein it is said:

> "The important question in this case is whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business, and are simply the agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors.
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> • • • • • • •
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> "We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this republic a dual system of government,—national and state,—each operating within the same territory and upon the same persons, and yet working without collision, because their functions are different. There are certain matters over which the national government has absolute control, and no action of the state can interfere therewith, *and there are others in which the state is supreme, and in respect to them the national government is powerless.* To preserve the even balance between these two governments, and hold each in its separate sphere, is the peculiar duty of all courts; preeminently of this,—a duty oftentimes of great delicacy and difficulty.
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> • • • • • • •
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> "Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a

> corporation for governmental purposes and those in aid of private business, a like distinction, may be recognized when we are asked to limit the full power of imposing excises granted to the national government by an implied inability to impede or embarrass a state in the discharge of its functions. It is reasonable to hold that, while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet, whenever a state engages in a business which is of a private nature, *that business is not withdrawn from the taxing power of the nation.*" (Emphasis ours)

Compare *Willmette Park District* v. *Campbell,* 338 U. S. 411, 94 L. Ed. 177; *New York* v. *United States,* 326 U. S. 572, 90 L. Ed. 326; *Allen* v. *University System,* 304 U. S. 439, 82 L. Ed. 1448; *Helvering* v. *Powers,* 293 U. S. 214, 79 L. Ed. 291; and *Ohio* v. *Helvering,* 292 U. S. 360, 78 L. Ed. 1307.

The increasing social needs of the state may only be met from taxes as hereinabove shown. The taxation of oil in Mississippi is a principal source of revenue. See Appendix "E". And that thus at issue is when *ex gratia* the government took from Kalmia (if it so did) this oil without compensation, and without disclosing to Kalmia that it could not pay therefor (*United States* v. *Nebo Oil Company,* 90 F. Supp. 73) and wrongfully failed to disclose the settled policy of the National Forest Reservation Commission that mineral retention was conservative of navigation and reforestation (compare the want of frankness in the answers to interrogatories propounded to the United States Tr. 80 wherein the fundamental policy of the government was, we submit, wrongfully concealed) and as a governmental secret refused to disclose the realizations from leases, Tr. 353, which we are at liberty to presume equalled at least three-quarters of a million dollars secured from the recited considerations, the presumption is based on retaining all of the surface and all of the timber and disposing of naught requi-

site to conserve the constitutional functions of the United States as to navigation and timber. We submit that the same declaration made by Mr. Justice Brewer as to the liquor business in Carolina is applicable to the oil business under the Weeks Act land in Mississippi. For in acquiring the surface and the timber had the government been frank and honest with Kalmia as we submit it was obligated to do when dealing with its subjects, Kalmia just as the Walkers, just as the thousands of other citizens, would have retained this oil and Mississippi's sovereignty hereasto remained paramount because that done, *quo ad* oil, was purely a business venture whereasto the United States, with deference, was without power. Compare *United States* v. *Burnison,* 339 U. S. 87, 94 L. Ed. 434; *United States* v. *Fox,* 94 U. S. 315, 24 L. Ed. 192. The states might thus engage. Compare *Jones* v. *Portland,* 245 U. S. 217, 62 L. Ed. 252; *Green* v. *Frazier,* 253 U. S. 233, 64 L. Ed. 878; *Everson* v. *Board of Education,* 330 U. S. 1, 91 L. Ed. 711; *Family Life Ins. Co.* v. *Daniel,* 79 F. Supp. 62. The United States could have, *quo ad* that thus done, asserted its taxing power to the extent that the action was not governmental, but in such business the United States may not engage not having hereasto the delegated power. Compare *Kidd* v. *Pearson,* 128 U. S. 120, 32 L. Ed. 346, but compare *Collins* v. *Yosemite Park & Curry Co.,* 304 U. S. 518, 82 L. Ed. 1502. See, also, *Susquehanna Power Company* v. *State Tax Commission,* 283 U. S. 291, 75 L. Ed. 1042, 1045, wherein it is said:

> "Assuming, for present purposes, that the license of the Power Commission is a federal instrumentality, immune from taxation or other direct interference by the state, it does not follow that the property appellant uses in its power project is clothed with that immunity. The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing

power of the one or the appropriate exercise of its functions by the other. * * *."

The state did not seek to tax the surface requisite for Federal fundamental purposes so far as this record is concerned. There is under Mississippi law a lateral segregation between timber, surface and minerals, each *quo ad* the taxing power, possessing a distinct severability. Compare *Fox* v. *Pearl River Lumber Co.*, 80 Miss. 1, 30 So. 583; *Butterfield Lumber Co.* v. *Guy*, 92 Miss. 361, 46 So. 78; *Stern* v. *Parker*, 200 Miss. 27, 27 So. 2d 402; *Hendrix* v. *Foote*, 205 Miss. 1, 38 So. 2d 111; and *State* v. *Cummings*, 206 Miss., 40 So. 2d 587.

The Weeks Act specifically recognized non-interference with surface enjoyment as the criterion obtained by the statute. Compare Section 518, Title 16 U. S. C. A., c. 186, Sec. 9, 36 Stat. 962, as amended c. 145, 37 Stat. 855, wherein it is said:

> "Such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which, from their nature will, in the opinion of the National Forest Reservation Commission and the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of sections 480, 500, 513-519, and 521 of this title. * * *."

Thus when conformity hereasto is, then the national purpose has been delimited. Compare *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 75 L. ed. 1032. And as said in *Gulf Refining Co.* v. *Stanford*, 202 Miss. 602, 30 So. 2d 516, 173 A. L. R. 1099, leasing is the common form for development and therein the Government has vested as to this oil a defeasible fee in its lessees. And that whereto alone the Government will receive is a potential profit from its royalty whereasto, with deference, *quo ad* Mississippi's sovereignty and her taxing needs, the United States stands just exactly

where South Carolina stood when it engaged in the liquor business as to the taxing power of the United States.

IV. Under the Weeks Act the United States Has Consented, If This Be Essential, to Ad Valorem Taxation of Oil Reservations.

Wilson v. *Cook*, 327 U. S. 474, 90 L. ed. 793, is persuasive and its principles intimated, at least impliedly, should be extended to compel recognition of Mississippi's sovereignty as to the underlying oil wherefor the United States did not pay and whereasto in good conscience if it had treated all of its citizens alike as we submit it should, it would have left Kalmia with this oil and not have taken it for $1.35 per acre in the midst of a depression when Kalmia was beset by large tax payments to Mississippi which it could not meet, untruthfully, through its agent, leading Kalmia to believe that it was a condition exacted by the United States that there be only a ten year mineral reservation. It may have been that Conarro, who is assumed to have known of the policy of the National Forest Reservation Commission, did not intend to mislead but no one has dared to controvert that he did mislead and the District Court specifically excluded a positive declaration made by the Government's examining attorney to that effect. There is a similarity between timber, which must remain in place, and oil and gas which are fugacious with power of transition. The United States established in Arkansas, with a consent from Arkansas remarkedly like the consent assumed to be given by Mississippi, a national forest and having thus done as to the timber therefrom removed, the State assumed to impose a tax. Therein it was said, p. 797:

> "An Arkansas statute, Act 118 of 1923, * * * imposes 'a privilege or license tax . . . upon each person . . . engaged in the business of . . . severing from the soil . . . for commercial pur-

> poses natural resources, including . . . timber.' By Sec. 13,372, as a condition of the license, there is imposed on the severer an obligation to pay the tax and consent that the tax 'shall . . . remain a lien on each unit of production until paid into the State Treasury.' Section 13,375 fixes the tax at 7 cents per thousand feet of the timber severed. Section 13,376 provides that the state 'shall have a lien upon any and all natural resources severed from the soil'." (which we contend, with deference would apply to oil, a natural resource). "In Section 13,382 it is provided that 'the payment of said privilege taxes shall be required of the severer . . . actually engaged in the operation of severing natural resources, whether as owner, lessee, concessionaire or contractor. . . . The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.' "

In this case, the land was acquired by consent under the Weeks Act and the United States pursuant to its public policy as to navigation and timber and as to this timber so by it owned and grown made a disposition to the person who thus severed and this business thus done was that whereasto the tax was, the imposition being, however, *in rem* if unpaid against the timber of the United States. The Court further said in the *Wilson* case, p. 802:

> "A further question is whether the lands in the forest reserve, which were purchased for that purpose by the United States, are within the *territorial taxing jurisdiction of the state.* The answer turns on the interpretation of the statute of the United States authorizing the acquisition of lands, Secs. 7 and 12 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 USCA Secs. 480, 516, 5 FCA Title 16, Secs. 480, 516, and of the state statute of Arkansas authorizing the sale. Pope's Digest, Sec. 5646. The meaning of both statutes, as applied in this case, *is a federal question,* since upon

their construction depend rights, powers and duties of the United States. Silas Mason Co. v. Tax Commission, 302 US 186, 197, 82 L ed 187, 196, 58 S Ct 233, and cases cited.

"The statute of Arkansas consenting to the purchase of forest lands by the United States, provided that the state should 'retain a concurrent jurisdiction with the United States in and over lands so acquired . . .', to issue and execute 'civil process in all cases, and such criminal process as may issue under the authority of the state. . . .' It made no express grant or reservation of legislative power over the areas purchased. *Hence the statute cannot be taken as having yielded or intended to surrender to the Federal Government the state legislative jurisdiction over the area in question, so far as exercise of that jurisdiction is consistent with federal functions.* Any doubt as to the effect of such a grant by the state in conferring exclusive legislative jurisdiction over the territory which is acquired by the Federal Government is removed by the provisions of the federal statute.

"Section 12 (Sec. 480, Title 16 U.S.C.A.) of the federal statute, authorizing the purchase, provided: 'That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the state wherein such land is situated, shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or *be absolved from their duties as citizens of the State.*'

"*By this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants 'be absolved from their duties as citizens of the State'.* Compare Silas Mason Co. v. Tax Com-

mission, 302 US 186, 82 L ed, 187, 58 S Ct 233, supra; Atkinson v. State Tax Commission, 303 US 20, 82 L ed 621, 58 S Ct 419; Collins v. Yosemite Park & C. Co. 304 US 518, 528, 82 L ed 1502, 1509, 58 S Ct 1009; James Stewart & Co. v. Sadrakula, 309 US 94, 99, 84 L ed 596, 600, 60 S Ct 431, 127 ALR 821.

"Our conclusion, based on the construction of the interrelated state and federal statutes, is that the state has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States.

"What we have said of the argument that the tax assessed on plaintiffs is an unconstitutional burden on the Government, is applicable to the tax assessed for severance of timber from forest reserve lands which, from the beginning, have been a part of the public domain. That tax is likewise valid if the state has legislative jurisdiction over such lands within its boundaries.

"Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, (Act of June 15, 1836, c 100, 5 Stat 50) the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution. Ft. Leavenworth R. Co. v. Lowe, 114 US 525, 539, 29 L ed 264, 265, 5 S Ct 995; Utah Power & L. Co. v. United States, 243 US 389, 404, 61 L ed 791, 816, 37 S Ct 387. (Compare *United States v. Texas*, — U.S. —, 94 L. ed. 805) Such authority did not pass to the United States by virtue of the provisions of Article 1, Sec. 8, cl 17, of the Constitution, which authorize it 'to exercise *exclusive* Legislation . . . over all Places purchased by the *Consent* of the Legislature of the State in which the Same shall be.'

"Since the United States did not purchase the lands with the consent of the state, *it did not acquire exclusive jurisdiction under the constitutional provision, and*

there has been no cession of jurisdiction by the state. Surplus Trading Co. v. Cook, 281 U. S. 647, 651, 74 L. ed. 1091, 1094, 50 S. Ct. 455; Silas Mason Co. v. Tax Commission, supra (302 U. S. 210, 82 L. ed. 203, 58 S. Ct. 233). Although Arkansas has, by Sec. 5647, Pope's Digest, conferred on Congress power to pass laws, civil and criminal, for the administration and control of lands acquired by the United States in Arkansas, *it has ceded exclusive legislative jurisdiction neither over lands reserved by the United States from the public domain, nor over lands acquired in the state.* Ft. Leavenworth R. Co. v. Lowe, supra (114 U. S. 530, 531, 29 L. ed. 266, 5 S. Ct. 995). *It follows that the state has retained its legislative jurisdiction,* which it acquired by statehood, over public lands within the state which have been included within the forest reserve.

"*We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it,* whether they were originally a part of the public domain of the United States, or were acquired by the United States by purchase, and that the tax assessed against plaintiffs is not subject to any constitutional infirmity, or to any want of *taxing jurisdiction* of the state to lay it with respect to transactions on the federal forest reserve located within the state." (Emphasis ours.)

And in the dissenting opinion Mr. Justice Rutledge said, p. 804:

"In No. 328 the Court sustains the application of the Arkansas severance tax to the appellants. In my judgment the cause should be remanded to the state court for it to determine the *applicability of the lien and collection provisions to the United States, or their severability,* and in the light of that determination to ascertain the constitutional validity of the tax as applied to appellants. *Those issues are inescapable on the record in this case.* For until they are determined any decision here can affect only a tax of uncertain incidence, unless the Court in sustaining it means to rule, as I think the

> Arkansas court ruled, *that the tax is valid whether or not the statute's lien and collection provisions apply to the United States as owner of the land and the severed timber.*" (Emphasis ours.)

Section 112 of the Constitution was paramount to the power of the Legislature and the purpose of the Weeks Act as to surface and timber (*United States* v. *Nebo Oil Co.*, 90 F. Supp. 73), and the specific recognition of state sovereignty as to oil reserves must be kept constantly in view. Authorities infra. As was pointed out in *Merrill Eng. Co.* v. *Capital Nat. Bank*, 192 Miss. 378, 5 So. 2d 666, the oil can be withdrawn from the earth, is intended thus to be and when withdrawn the cavern left in no way affects the surface. Of course, the timber may reproduce; under certain conditions the oil may re-enter under its power of self-locomotion but the Weeks Act was centered upon the conservation of timber as that requisite under the commerce power whereas as to oil there never has been such a power in the United States because not within the original purpose of the Constitution, certainly not within the original purpose of this Act. Compare *Wilson* v. *Cook*, 327 U. S. 474, 90 L. ed. 793; *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73. This Court was careful to make a determination that, quo ad the timber operator, and, we submit, in the light of the dissenting opinion of Mr. Justice Rutledge as to the tax lien upon the timber of the United States and the collection of the tax therethrough, the timber belonged to the United States and was being purchased from the United States, the party who severed was nevertheless as to the timber subject to state jurisdiction. This opinion was so thus interpreted in *United States* v. *Nebo Oil Company*, 90 F. Supp. 73, wherein the United States as owner under the Weeks Act sought to obtain for itself certain mineral rights and thereasto in an able opinion was defeated in its contentions and

thereto for that, with deference, properly said, reference is hereby made.

This Court has approved the *Wilson* case, supra, in *Oklahoma Tax Com.* v. *Texas Company,* 336 U. S. 342, 93 L. ed. 721; *S. R. A.* v. *Minnesota,* 327 U. S. 558, 90 L. ed. 851.

Herein, if the *Nebo* case, supra, be followed, the status of the underlying oil is a federal question whereasto the decision here is conclusive. The character of oil and gas as property is in large measure sui generis. Compare *Rist* v. *Toole County,* — Mont. —, 159 P. 2d 340, 162 A. L. R. 402, and authorities supra. Compare, also, 36 *Am. Jur.,* "Mines and Minerals", Sec. 23, 35, p. 297, 306; 58 *C. J. S.,* "Mines and Minerals", Sec. 134, p. 213; 1 *Summers Oil and Gas,* 2nd Ed., Secs. 11, 61 and 62; *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 44 L. ed. 729; and *Gulf Refining Co.* v. *Stone,* 197 Miss. 713, 21 So. 2d 19. So that, if there be any way in which this Court can sustain the validity of Mississippi's statutes by properly interpreting the character of property in oil and gas, we submit that this should be so done, especially is this so because by Sec. 486, Title 16 U. S. C. A., c. 105, Sec. 2, as amended Feb. 28, 1925, c. 375, 43 Stat. 1090:

> "* * * All property, rights, easements, and benefits authorized by this section to be retained by or reserved to owners of lands conveyed to the United States shall be subject to the tax laws of the States where such lands are located."

Strictly speaking, this declaration might be limited to exchanges authorized under Section 485, but, quo ad the taxing power, the reservation of the oil is precisely the same whether it arose under an exchange or under another form of conveyance. In short, the form of conveyance is, with deference, immaterial, the substance of the conveyance controlling, and when Congress specifically provided that these reservations should be in accordance with the law of the

state, this is valid. Compare *United States* v. *Gerlach Live Stock Co.*, — U. S. —, 94 L. ed. 876, 878:

> "On Writ of Certiorari to the United States Court of Claims to review awards of compensation for deprivation of water rights along the San Joaquin River in California, caused by the construction of the Friant Dam and its dependent irrigation system.
>
> • • • • • • •
>
> "We cannot disagree with claimants' contention that in undertaking these Friant projects and implementing the work as carried forward by the Reclamation Bureau, *Congress proceeded on the basis of full recognition of water rights having valid existence under state law.* By its command that the provisions of the reclamation law should govern the construction, operations, and maintenance of the several construction projects, *Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under these laws.* Cf. Nebraska v. Wyoming, 295 U. S. 40, 43, 79 L. ed. 1289, 1291, 55 S. Ct. 568; California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 164, 79 L. ed. 1356, 1364, 55 S. Ct. 725; Nebraska v. Wyoming, 325 U. S. 589, 614, 89 L. ed. 1815, 1829, 1830, 65 S. Ct. 1332; Silas Mason Co. v. Tax Com. 302 U. S. 186, 82 L. ed. 187, 58 S. Ct. 233. • • •." (Emphasis ours.)

Compare *Capital Greyhound Line* v. *Brice*, — U. S. —, 94 L. ed. 733; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128; *Re Rahrer* (Wilkerson v. Rahrer), 140 U. S. 545, 35 L. ed. 572; *Louisville & Nashville R. Co.* v. *F. W. Cook Brewing Co.*, 223 U. S. 70, 56 L. ed. 355; *Kentucky Whip & Collar Co.* v. *I. C. R. Co.*, 299 U. S. 334, 81 L. ed. 270, 276, wherein it is said:

> "By the Wilson Act of August 8, 1890, intoxicating liquors transported into any State were subjected upon arrival to the operation of state laws to the same extent

as though they had been produced within the State, although still in the original packages. * * *."

Furthermore, when there is the ownership of the underlying oil, Congress specifically provided as to damages thus, 43 Stat. 1090, Title 16 U. S. C. A., Sec. 486:

"* * * where mineral reservations are made in lands conveyed by the United States it shall be so stipulated in the patents, and that any person who acquires the right to mine and remove the reserved deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom, and may mine and remove such minerals upon payment to the owner of the surface for damages caused to the land and improvements thereon. * * *."

Note further, 30 Stat. 36, Title 16 U. S. C. A., Sec. 481, which provides:

"All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

On land whereasto the right of entry and removal has determined, the general rule is that thereby there is not a forfeiture of the timber but that removal may be had, compensating the surface owner for all damages done. Compare *Irons* v. *Webb*, 41 N. J. L. 204, and other authorities supra. See, also, *Ingram-Day Lbr. Co.* v. *Clark*, 43 Miss. 813.

So that under the Weeks Act as thus interpreted by this Court, the jurisdiction of Mississippi under its sovereign power as to taxation has not, we submit, in any way determined, and it was not the intention of Congress that it should

be divested but that, quo ad oil, this sovereignty should persist. As to reservation of oil, at least, we have the express as well as the implied obligation. Compare *West* v. *Oklahoma Tax Com.*, 334 U. S. 723, 92 L. ed. 1680, 1682, wherein it is said:

> "In this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heirs is of no consequence to taxability of the transfer."

And that herein at issue is the taxability of oil under lands wherein thereasto a reservation has been made and in a broader sense, but not necessarily herein involved, under lands wherein there is not a reservation but an absolute ownership and we, with deference, submit that as to the consent of the United States to the territorial sovereignty of the forty-one states wherein there are these national forests their laws as to oil in reservations are to be operative. Oil was the great issue in *United States* v. *California*, 332 U. S. 19, 91 L. ed. 1889; *United States* v. *Louisiana*, — U. S. —, 94 L. ed. 800; *United States* v. *Texas*, — U. S. —, 94 L. ed. 805; and state taxation of federal rights therein have been in issue since *M'Culloch* v. *Maryland*, 4 Wheat (U. S.) 316, 4 L. ed. 579, and, with deference, this Court has not drawn such a line as that this vital issue between federal and state sovereignty can be with absolute certainty determined unless this Court will herein do the needful. Compare *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, — U. S. —, 94 L. ed. 757, comments of Mr. Justice Frankfurter; and as to this issue which is upon the constitutional level we, with deference, submit the Court of Appeals has not vouchsafed such a decision as will discharge this Court from its paramount obligation to make hereasto an outstanding precedent. The same necessity as has compelled certiorari in the *Wilson* case, supra, and

those that follow it, is inherently operative here and imperatively demands solution as to fundamental factors solely here solvable nationally. Remember, the United States had only a possibility of reverter when this tax sale was of the oil and under sovereign state power, Mississippi possessed, with the nation's consent and, also, because it had failed to make a cession, the right to compel property within its boundaries to pay for its creation—its protection.

In the *New Brunswick* case, supra, the acquisition was under an exclusive power and had to do with that wherein the United States had an absolute right paramount to state sovereignty, the government under Mississippi law, if applicable, being trustee of the property for the purchaser and the purchaser being trustee of the purchase price for the government. Compare *J. M. Griffin Co.* v. *Jernigan,* 170 Miss. 343, 154 So. 342.

With this absolute right in the government, both jus in re and jus ad rem, the state could not divest but here Mississippi possessing never forewent and in addition to the extent of reservations in oil, the United States consented specifically that State laws as to taxation should admeasure and remain and, with deference, we ask that here that be done as declared proper by Mr. Justice Jackson in *Federal Power Com.* v. *East Ohio Gas Co.,* — U. S. —, 94 L. ed. 213, 220.

V. Mississippi's Sale of Minerals, Including Oil, to Pay for Defaulted Ad Valorem Non-Discriminatory Tax, Valid.

Compare *Minor's Law of Tax Titles,* page 2, wherein it is said:

> "The forfeiture or sale of land for unpaid taxes was unknown to the common law of England, and does not seem to have been recognized, generally at least, in this country during the Colonial period. Virginia was

probably the first to adopt the plan, such a statute being passed by her legislature in 1790.

"At first the policy in Virginia was to forfeit the delinquent land absolutely to the Commonwealth, upon the failure to pay the taxes, and such is still the policy of some of the states. Of the right of the state governments to declare lands forfeited to the state upon the failure to pay taxes assessed thereon, there has never been any serious question. Every owner holds his estate upon the implied condition that he will furnish a list of his taxable property when required by law, and promptly pay his share of the common burdens assessed against the entire community; and if he omits to comply with the condition, the paramount authority of the state, which is entitled to enter for the breach of this condition, comes in and declares the estate forfeited for breach of the condition.

"But the principle which gives the state—the parens patriae—the right to impose such an implied condition upon the tenure of property, denies it to the federal government on the one hand and to county or city governments on the other. * * *."

Compare *Griffin* v. *Dogan & Martin*, 48 Miss. 11, but note *Griffin* v. *Mixon*, 38 Miss. 424. See, also, *State* v. *Woodroof*, — Ala. —, 46 So. 2d 553, 558, wherein the Alabama court held a specific lien upon the specific property paramount to the general lien imposed by the United States under Sec. 3466, (31 U. S. C. A., Sec. 191), distinguishing *Spokane County* v. *United States*, 279 U. S. 80, 73 L. ed. 621; *People of State of New York* v. *Maclay*, 288 U. S. 290, 77 L. ed. 754; *United States* v. *State of Texas*, 314 U. S. 480, 86 L. ed. 356; *United States* v. *Waddill, Holland & Flinn*, 323 U. S. 353, 89 L. ed. 294; and *People of State of Illinois* v. *Campbell*, 329 U. S. 362, 91 L. ed. 348. Compare *Hendrix* v. *Foote*, 205 Miss. 1, 38 So. 2d 111; *Bailey* v. *Federal Land Bank*, 206 Miss. 354, 40 So. 2d 173; *State* v. *Cummings*, 206 Miss. 630, 40 So. 2d 587.

(a) The sale was made September 21, 1942, and under Section 9935, Mississippi Code of 1942, among other things, it is provided:

> "* * * All such lists shall vest in the State or in the individual purchaser thereof, a perfect title to the land sold for taxes, *but without the right of possession for the period of and subject to the right of redemption;* * * *." (Emphasis ours.)

The law is the same in Mississippi as it was in New Jersey. Compare *New Brunswick* v. *United States,* 276 U. S. 547, 72 L. ed. 693; *Jackson* v. *Ashley,* 189 Miss. 818, 199 So. 91; *Merrill Eng. Co.* v. *Capital Nat. Bank,* 192 Miss. 378, 5 So. 2d 666.

(b) By Section 9936, Mississippi Code of 1942, it was also provided:

> "* * * The said lists shall vest in the state or the individual purchaser thereof a perfect title to the land sold for taxes, but without right of possession and subject to the right of redemption; * * *."

Then after the expiration of the redemption period of two years, the clerk delivered a deed in accordance with Section 9958, Mississippi Code of 1942, whose provisions are:

> "* * * such conveyance shall vest in the purchaser a perfect title with the immediate right of possession to the land sold for taxes; * * *."

Compare *Seward* v. *Dogan,* 198 Miss. 419, 21 So. 2d 292; *Murphey* v. *Seward,* 145 Miss. 713, 110 So. 790. Minerals are sold precisely as land. Mississippi Code of 1942, Sec. 9770.

Judge Mize specifically found that this tax sale to Hendrix was valid, but was invalidated as to the oil in virtue of the sovereignty of the United States, relying therefor exclusively upon *New Brunswick* v. *United States,* 276

U. S. 547, 72 L. ed. 693, holding that the title to the oil vested in the United States under the reservation as at December 24, 1943, because Kalmia had not during the preceding five-year period been found to have employed to commercial advantage, Tr. 410. So that if Kalmia had operated to commercial advantage during this five-year period there would have been under this deed an extension to December 24, 1948, and thereafter possibly in perpetuity the United States having the substantial equivalent of a possibility of acquisition—the converse of a possibility of reverter since no title whatsoever at the date of the deed vested in the Government and none could so vest at the pleasure of Kalmia. That Kalmia thus did operate to commercial advantage, we have, with deference, demonstrated supra and there is following the finding of Judge Mize to be considered this further important factor. As at December 24, 1943, the terms of the deed require, Tr. 409:

> "* * * provided that if at the termination of the said 10-year period of reservation it is found that such oil, gas and other valuable mineral rights and interests are being operated or have been operated at any time during the preceding five years to commercial advantage, * * *."

There is hereunder initially an absolute reservation of all minerals. That at this date, the declaration of the deed is that if "it is found" there shall then be an extension in perpetuity, but the Government in drafting this deed did not say who was to find or how the finding was to be evidenced, but left in suspension the matter by simply providing if "it is found". Now, this deed is remarkable in that it assumes to provide at its conclusion for the vestiture of the minerals in the United States thus, Tr. 409:

> " 'That at the termination of the 10-year period, if not extended, or at the termination of the extended pe-

riod in case the operation has been carried on for a number of causes under (carried on for the number of days and under, Tr. 25) conditions stated, the right to mine and remove oil, gas and other valuable minerals shall terminate and complete fee in the land become vested in the United States'."

(c) The Court of Appeals properly conceded under the *New Brunswick* case, *supra,* that all property belonging to Kalmia remained subordinate to state taxing sovereignty, but contended that upon December 24, 1943, *per se,* the title was divested from Kalmia and vested in the United States. Assuming this reasoning to be accurate as to that whereto the property was subject yet herein note

1. That reserved was "all minerals"—oil—with the absolute right at pleasure to remove, presumptively through leases to those accustomed to operating oil properties.

2. The provision in this deed was, Tr. 23:

> "Provided; Further, that the right or rights to mine and reserve oil, gas and other valuable minerals when extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit: December 24, 1943."

The court held that this provision as to the twenty-five acres was void for uncertainty. Compare Tr. 397:

> "3. The Court concludes, as a matter of law, that the provision as follows: 'Provided further, that the right or rights to mine and reserve oil and gas and other valuable minerals, when extended, shall be limited to twenty-five acres of land around each well or mine producing and each well or mine being drilled or developed at the time of the first extension, to-wit: December 24, 1943' is void in so undertaking to limit or describe such area of acreage because of the vagueness of the description, * * *."

Compare *Jones* v. *Mount,* 30 Ind. App. 59, 63 N. E. 798; *Norris* v. *Fleming,* 62 Idaho 381, 112 P. 2d 482; *Parsons & Sweeney Oil Co.* v. *McCormic,* 68 W. Va. 604, 70 S. E. 371; *First Savings Bank & Trust Co. of Albuquerque* v. *Elgin,* 29 N. M. 592, 225 P. 582; *Indianapolis Natural Gas Co.* v. *Spaugh,* 17 Ind. App. 683, 46 N. E. 691; *Ramage* v. *Wilson,* 37 Ind. App. 532, 77 N. E. 368, 88 N. E. 863; *Monaghan* v. *Mount,* 36 Ind. App. 188, 73 N. E. 579; *Nunnery* v. *Ford,* 92 Miss. 263, 45 So. 722; *McAllister* v. *Honea,* 71 Miss. 256, 14 So. 264; *Jefferson* v. *Walker,* 199 Miss. 705, 26 So. 2d 239. And under Mississippi law if this be void, it would leave the reservation in effect. Compare *Ates* v. *Ates,* 189 Miss. 226, 196 So. 243.

(d) Whether or not the court below should have accorded to this provision any effect was with all a judicial question whereasto judicial recourse was requisite.

(e) Herein, persons of unquestioned veracity, Tr. 267, *et seq.,* swore that, *quo ad* this deed, there was a material misrepresentation of fact whereby invalidation occurred. Compare *Brown* v. *Ohman,* — Miss. —, 42 So. 2d 209, 43 So. 2d 727; *Derry* v. *Peek,* House of Lords, 14 App. Cas. 337. It is true that the representative, Conarro, was by the District Court held to have contradicted this testimony which, with deference, he did not, but as stated in the Government's answers to interrogatories, this fraud was not a relevant issue, Tr. 90:

> "* * * Plaintiff further shows that the allegations of misrepresentation, made by defendant, deal with a matter of law upon which defendant would not have been entitled to rely even if such a representation had been made * * *."

And furthermore petitioners offered to prove by competent evidence that Montgomery, the government's examining at-

torney, specifically made this statement as to the inability to limit otherwise than was done by this deed. To this proof the United States objected and its objection was sustained, Tr. 385:

> "Q. At the time that it was signed, please state whether or not there was a representation made to you by Mr. Montgomery—as near as you can give the Court, give it to him in his own words.
>
> "A. Well, you know, we had discussed this with him about the mineral mix-up. He said, you have got to clear it, so we cleared it. Just like Mr. Conarro said, we have had many discussions, but it all boils down to this—he said 10 years is the limit.
>
> "The Court:
>
> "I will adhere to my ruling on the objection and will exclude that from consideration as to what was said by Mr. Montgomery."

So that while it is true that the District Judge assumed to find that petitioners had not met the burden of proof as to fraud he at the same time held that the petitioners could not make this proof because their evidence thereasto was incompetent and we thus have Kalmia, according to the District Judge, obligated to prove fraud clearly and convincingly (*Brown* v. *Ohman*, — Miss. —, 43 So. 2d 209) but at the same time the District Judge holding that tender of evidence specifically so thus showing was not admissible. So herein, that at issue is not a proper admeasurement of petitioner's evidence but the wrongful exclusion by the District Judge of that competent evidence which was in and of itself adequate to prove the fraud whereon petitioners relied but which the District Judge assumed to hold could not be done as was said in Finding No. 9, Tr. 423:

> "9. The Court concludes as a matter of law that, even if proved, the misrepresentation which the Government's agent, Mr. Conarro, is charged with making, would not serve as a basis for voiding any part of the

> deeds to the United States because it dealt with a matter of law with which Kalmia was charged with notice and Mr. Conarro was not authorized to make any representations as to matters of law."

Fraud vitiates all by it touched, and when the attorney for the United States sought thus to declare that there could be no other reservation further than the ten years and there was, *quo ad* this oil, the uniform rulings of the National Forest Reservation Commission, delineated in *United States* v. *Nebo Oil Company*, 90 F. Supp. 73, we have a right, in considering the validity of this tax title, to assume the fraud existent for the United States attorney was certainly such a person assuming to make such a representation as that those ignorant of national policy could thereon rely, and when the District Judge assumes to determine this case *contra* as to the *quantum* of proof requisite when he excluded the most potent evidence directly supporting, we find such, with deference, a case as though affirmed by the Court of Appeals renders rectification here requisite. The District Judge conceded the potency of petitioners' evidence, including declarations uncontradicted of Senator Harrison and other credible witnesses and in addition the exclusion of competent evidence directly supportive of that said by our distinguished Senator, and if as, with deference, was the case, these declarations of Mr. Montgomery and others which could have been offered had the District Judge not excluded, the burden would have been met and in virtue of this wrongful exclusion we insist it must be herein held that there was that fraud which would have thus invalidated.

But note *Staten Island Hygeia Ice & Cold Storage Co.* v. *United States*, CCA 2nd, 85 Fed. 2d 68, 71:

> "• • • But in the case at bar the law was no longer in doubt; the Supreme Court had settled that collection of the asserted claims could not be made, and official information of that decision had been given to in-

ternal revenue officers by the January, 1920, issue of Treasury Decisions; hence the deputy collector was acting contrary to his duty in demanding payment. Under such circumstances, to allow the government to insist upon a compromise induced by its agent's misrepresentation of its rights against a taxpayer, and thereby to retain the prior payment which it was legally bound to refund, would be highly inequitable and is not sanctioned by the authorities. * * * Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff's legal rights is induced by misrepresentations, even though innocently made, *if it be reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant.* * * * If the deputy collector acted beyond his authority in demanding payment of an outlawed tax and in soliciting the offer to compromise, *his agency was nevertheless ratified when the government took advantage of the offer he had procured. There is nothing in the nature of sovereignty or in the recognized prerogatives of the sovereign which would allow the government to take and keep a right without the accompanying burden that modifies it, namely, in this case, voidability for misrepresentation.*" (Emphasis ours.)

See, also, *Bull* v. *United States,* 295 U. S. 247, 79 L. Ed. 1421; *Shooters Island Shipyard Co.* v. *Standard Shipbuilding Corp.,* 293 Fed. 706, CCA 3rd; *Bradburn* v. *McIntosh,* 159 Fed. 2d 935, CCA 10th; *United States* v. *Beebee,* 17 Fed. 36; *Gooch Milling & Eleva. Co.* v. *Commissioner of Internal Revenue,* 133 Fed. 2d 131, CCA 8th; *United States* v. *The State National Bank of Boston,* 96 U. S. 30, 24 L. Ed. 637.

If this fraud which we submit was existent, by reason of the exclusion by the District Court of competent proof thereasto on the ground that Kalmia could not rely thereon, we find the Fifth Circuit in direct conflict with (a) this Court, (b) the Second Circuit and other Circuits, as well as (c) the State of Mississippi, and (d) the general law; and when that

estate thus infected was sold for taxes with an impossibility of hereasto suing the United States, the effect under this deed was to convert this condition, if it so were originally and were valid, into a covenant for the breach whereof to the extent essential compensation might be had, especially under the ruling of the National Forest Reservation Commission.

(f) Under the war power, on December 28, 1941, Donald M. Nelson, Director of priorities, issued a regulation, Conservation Order M-68, whereunder as to oil development and the critical material, steel, therefor requisite must needs be regulated, and among other provisions therein contained was found:

> "(7) To any case where Material is to be used by An Operator to drill or complete any well in any discovered or undiscovered oil field other than a Condensate Field, where such well conforms to a uniform well-spacing pattern of not more than one single well to each 40 surface acres."

And, further, in Petroleum Administrative Order No. 11 as amended January 4, 1944, it was further expressly provided:

> "(ii) the well must be located on a drilling unit consisting of at least 40 contiguous surface acres upon which no other drilling or producible well is located, * * *."

These actions thus taken by the United States were by it intended to be effectual as to the Kalmia deed and the general welfare then rendered it requisite that there should be not a twenty-five acre area, but a forty acre area, thus fundamentally changing pursuant to the war power that which precedently had assumed to be done by the Department of Agriculture, and that now at issue is, may the United States, having thus assumed so to do, insist upon, as against Kalmia and the state's sovereign taxing power,

that which under the war power was made requisite to be done by every person who thus sought to drill. In short, this section as to "right or rights" was thus, with deference, written out of this deed if it ever were validly therein so that as at the alleged date of expiration on December 24, 1943, it had been therefrom completely deleted and thereto as at that date no validity whatsoever, quo ad oil, could be to it vouchsafed. The United States, under its war power, could have thus foregone, had it elected, and we, with deference, submit that this act thus making effective for the national defense these petroleum deposits, drew out of this deed that clause whereon the Department of Agriculture seeks to stand, protesting as we do it had no authority whatsoever therein to place the provision initially. Compare *Chapman* v. *Sheridan Wyoming Coal Co.*, 338 U. S. 621, 94 L. ed. 307. This was a further judicial question whereasto petitioners were entitled to a judicial determination under the Due Process Clause of the Fifth Amendment. Compare *Mulane* v. *Central Hanover Bank & Trust Co.*, — U. S. —, 94 L. ed. 578, 583, quoted supra. A judicial hearing is essential to due process. Compare *Ewing* v. *Mytinger & Casselberry, Inc.*, — U. S. —, 94 L. ed. 776, 779, wherein it is said:

> "• • • We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. See Lichter v. United States, 334 U. S. 742, 92 L. ed. 1694, 68 S. Ct. 1294; Inland Empire Dist. Council v. Millis, 325 U. S. 697, 89 L. ed. 1877, 65 S. Ct. 1316; Opp Cotton Mills v. Administrator of Wage & Hour Division, 312 U. S. 126, 85 L. ed. 624, 61 S. Ct. 524."

This Court confines its determination of constitutional questions to the precise factors integrated. Compare *Sweatt* v. *Painter*, — U. S. —, 94 L. ed. 783; *Mauer* v. *Hamil-*

ton, 309 U. S. 598, 84 L. ed. 969, 135 A. L. R. 1347. And herein, therefore, will not proceed further than to reconcile the conflict, if existent, between national and state sovereignty.

VI. The Legislature of Mississippi Prohibited from Consenting That the United States Might Acquire the Oil and, Quo Ad the Oil, the Assumed Consent of the Legislature a Nullity.

1. As shown by Appendix "F" hereto, the letter of the Attorney General, under the Mississippi Constitution, there was no power to consent to this oil acquisition. Compare Section 4 of the Constitution:

> "The legislature shall have power to consent to the acquisition of additional territory by the state, * * *."

2. Section 17 of the Constitution provides:

> "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

Presumptively under Mississippi's Constitution only that property requisite for the public use may be condemned, be it easement or be it fee. Minerals in Mississippi are separate from the soil and the timber, *Butterfield Lbr. Co.* v. *Guy,* 92 Miss. 361, 46 So. 78, and under this section the limitation would exclude the minerals. Compare *Nicholson* v. *Board of Mississippi Levee Com.,* 203 Miss. 71, 33 So. 2d 604; *Whitworth* v. *Mississippi State Highway Com.,* 203 Miss. 94, 33 So. 2d 612, which decisions the Federal court declined to follow or apply.

3. Section 33 of the Constitution provides:

> "The legislative power of this state shall be vested in a legislature which shall consist of a senate and a house of representatives."

Compare *Alcorn v. Hamer,* 38 Miss. 652, wherein it is declared, p. 749:

> "The legislative power, to whatever subjects it may be applied, and whatever may be its extent, is vested exclusively in the Senate and House of Representatives, by the people, in whom it resides. They have, by the highest and most solemn of compacts, the Constitution, voluntarily relinquished their right to exercise it. It can only be reclaimed by an abolition, or an amendment of the Constitution, and the people are the only power competent to do either. To allow the legislature to associate with them in the exercise of the legislative function another tribunal, or to cast back upon the people their delegated powers, would be tantamount to a subversion of the Constitution, by changing the distribution of the powers of the government without the consent of the authority by which it was ordained. The proposition, that the legislature can surrender any portion of the authority with which it is vested, or authorize its exercise by any other body, or by the whole people of the State, is alike repugnant to the spirit and positive provisions of the Constitution. It is opposed to the express provisions of the Constitution, for the delegation of the legislative power to the Senate and House of Representatives, is declared to be exclusive of the other departments, and is necessarily exclusive of every other person or body. * * *."

Compare *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 79 L. ed. 446.

4. Section 84 of the Constitution provides:

> "The legislature shall enact laws to limit, restrict, or prevent the acquiring and holding of land in this

state by non-resident aliens, and may limit or restrict the acquiring or holding of lands by corporations."

See Appendix "F", wherein the Attorney General placed the United States as one covered hereby.

5. Section 112 of the Constitution, quoted *supra* and here integrated by reference. Although hereunder, exemptions may be created, commutation may not be, all property being necessarily taxed ad valorem and the legislature being without power to provide *contra*. Under Mississippi Constitution of 1869 it was possible to impose a privilege tax "in lieu of all other taxes county and municipal", compare *Vicksburg Bank* v. *Worrell*, 67 Miss. 47, 7 So. 219, but under the Constitution of 1890 this section was integrated to eradicate this practice and so did. Compare *Adams* v. *Mississippi State Bank*, 75 Miss. 701, 23 So. 395; *Adams* v. *Y. & M. V. R. Co.*, 77 Miss. 194, 24 So. 200; *Bank of Oxford* v. *Adams*, 78 Miss. 532, 29 So. 402. Compare, also, the dissenting opinion of Chief Justice Smith in *Gulf Refining Co.* v. *Stone*, 197 Miss. 713, 21 So. 2d 19, 24, wherein it was said:

> "It is manifest from these two sections of the statute that the privilege tax levied by section 2 thereof on persons producing oil for profit, or commercial purposes, was adopted by the legislature as a substitute for the ad valorem tax on oil in and produced from land. Such a tax violates section 112 of the Constitution, and is void. Adams v. Mississippi State Bank, 75 Miss. 701, 23 So. 395; Adams v. Bank of Oxford, 78 Miss. 532, 29 So. 402; Thompson v. Kreutzer, 112 Miss. 165, 72 So. 891; Chicago, etc., R. C. v. Robertson, 122 Miss. 417, 84 So. 449; Reed Bros., Inc. v. Board of Supervisors, 126 Miss. 162, 88 So. 504."

This expression of the distinguished Chief Justice accurately expressed the interpretation still applicable to Section 112 and under it the United States could not undertake to return any commuted realization for the State legis-

lature could not thereto validly agree. Note that the counties may not be deprived of the right thus to tax.

See, also, Section 500, Title 16 U.S.C.A., 36 Stat. 963, as amended, 58 Stat. 737, whereunder apparently *ex gratia* and not *ex debito,* Congress has assumed to donate 25% of all moneys received during any fiscal year from each national forest, admeasuring the same thus:

> "* * * In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by this section shall be based upon the stumpage value of the timber."

which may well exclude bonus paid for potential mineral production, it being the apparent intention of Congress to limit the payment by that produced in the forest not that produced from the mines. Compare *King County, Wash.* v. *Seattle School Dist. No. 1,* 263 U.S. 361, 68 L. ed. 339. Hereasto under Mississippi's Constitution this proposed commutation, if inclusive of minerals, contravenes. With deference, the United States should have begun this action in the State court and therein had determined all of these state constitutional questions with a review in this Court and by reason of the absence of the major oil companies this course is still, with deference, suggested. Compare *Spector Motor Service* v. *McLaughlin,* 323 U.S. 101, 89 L. ed. 101, approved in *American Federation of Labor* v. *J. Tom Watson,* 327 U.S. 582, 589, 90 L. ed. 873, 877; *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 383, 93 L. ed. 741, 752; *Federal Power Com.* v. *Interstate Natural Gas Co.,* 336 U.S. 577, 583, 93 L. ed. 895, 902; and *Propper* v. *Clark,* 337 U.S. 472, 489, 93 L. ed. 1480, 1494.

6. Section 170 of the Constitution provides:

> "Each county shall be divided into five districts, a resident freeholder of each district shall be selected, in the manner prescribed by law, and the five so chosen

> shall constitute the board of supervisors of the county, a majority of whom may transact business. The board of supervisors *shall have full jurisdiction over roads,* ferries, and bridges, * * *." (Emphasis ours.)

Hereunder, "full jurisdiction" was vested in the supervisors over the roads in the several counties. Under the order assumed to be made by the Forestry Commission, Tr. 156, it was sought to transfer to the United States jurisdiction over these roads. This act of the Legislature assumed to abrogate the Constitution. This power might be regulated, compare *King* v. *City of Louisville,* — Miss. —, 42 So. 2d 813, but not divested, and the supervisors are a part of the judicial department, *Haley* v. *State,* 108 Miss. 899, 67 So. 498, and an act of the legislature assuming to transfer any part of this "full jurisdiction" is unconstitutional. Compare *Board of Supervisors of Holmes County* v. *Black Creek Drainage Dist.,* 99 Miss. 739, 55 So. 963, 964; *Salter* v. *Bolivar County,* 111 Miss. 867, 72 So. 700; *Alabama & V. R. Co.* v. *Graham,* 171 Miss. 695, 157 So. 241; *State ex rel. Knox* v. *Grenada County,* 141 Miss. 701, 105 So. 541; *Jefferson County* v. *Arrighi,* 54 Miss. 668; *Paxton* v. *Baum,* 59 Miss. 531; *Seal* v. *Donnelly,* 60 Miss. 658; *Quitman County* v. *Self,* 156 Miss. 273, 125 So. 828. The proposed coordination as to roads, compare Sec. 501, 16 U.S.C.A., as amended, 58 Stat. 737, contravenes. United States may not be thus associated. Compare *Alcorn* v. *Hamer,* 38 Miss. 652.

7. Section 182 of the Constitution provides:

> "The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any political subdivision thereof may be a party, * * *."

As to these minerals whereas to the United States has no constitutional power of acquisition conferred by consent

from the state, if that were possible, it was the constitutional mandate that this property should remain absolutely subject to taxation. Compare *Gully* v. *Wilmut Gas & Oil Co.*, 174 Miss. 794, 165 So. 620. And the United States is a corporation within this prohibition. See Appendix "F", Attorney General's opinion.

8. Section 190 of the Constitution provides:

> "The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use; and the exercise of the police powers of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or general well-being of the state."

Quo ad the unauthorized acquisition, the Federal government occupies this position, thus showing the inability of the legislature to assume to surrender the minerals. Property thus held by the United States could not be condemned though the local state welfare imperatively demanded if the minerals were made immune by the legislature. The United States has not consented to be sued.

9. Section 227 of the Constitution provides:

> "A levee system shall be maintained in the state as provided in this article."

10. And by Section 232 of the Constitution it was expressly provided:

> "The commissioners of said levee districts shall have supervision of the erection, repair, and maintenance of the levees in their respective districts, and shall have power to cede all their rights of way and levees and the maintenance, management and control thereof to the government of the United States."

So that when it was intended by the Constitution that the United States should become invested with any specific authorization, this Constitution was at pains expressly therefor to specifically provide. This provision authorizing this cession—the United States having power under the Commerce Clause hereasto—therefore, presents, we submit, the sole condition whereunder Mississippi might abdicate in favor of the United States, but it will be noted that when the levee board condemned it did not take the minerals. Compare Section 233 of the Constitution; *Nicholson* v. *Board of Mississippi Levee Com.*, 203 Miss. 71, 33 So. 2d 604; *Whitworth* v. *Miss. State Highway Com.*, 203 Miss. 94, 33 So. 2d 612.

11. Compare Section 236 of the Constitution under which there is a mandatory requirement of taxation upon each and every acre wherefrom the legislature may not escape by surrendering to the Government.

12. Section 237 of the Constitution provides:

> "The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper."

Compare *Alcorn* v. *Hamer*, 38 Miss. 652.

13. Compare Sections 259 and 260 of the Constitution, whereunder the legislative power as to creation of new counties is prescribed and a prohibition against reducing the area of any county to less than four hundred square miles. The connotation is that each acre should be appropriately dealt with from a tax viewpoint, *Portwood* v. *Montgomery County*, 52 Miss. 523, and if the government took title to half of a county thereby destroying the local taxing power and the local instrumentalities of govern-

ment (compare Appendix "F", Attorney General's opinion, showing how this system displaces state obligations), such would, with deference, contravene the purpose, if not the letter, of these two sections, both of which strongly suggest that the legislature has no power to authorize an abdication or the integration of a plan other than that established by this Constitution, especially insofar as taxation is concerned which must be "uniform and equal throughout the state", Section 112.

14. See, also, Section 271 of the Constitution, under which the legislature may consolidate counties upon a vote.

These sections, with deference, as construed by the learned Attorney General, render as to these minerals it unconstitutional to do that assumed to be done. It might be that the Act itself could be sustained as constitutional while this specific assertion of power to acquire the minerals alone should be stricken down. Compare *Kennington* v. *Palmer,* 255 U.S. 100, 65 L. ed. 528, wherein the interpretation placed upon the Lever Law was specifically enjoined though in that case the act itself was also condemned.

So far, therefore, as the Legislature of Mississippi was concerned, it could not surrender state sovereignty as to taxation of minerals being therefrom precluded expressly, and it was a condition of the Weeks Act that the Legislature should so thus do before the United States assumed to claim title. So here, when the Legislature was thus without power to surrender the state sovereign authority as to taxation, the tax imposition remained in virtue of the Constitution, and *quo ad* the taxing power the acquisition of these minerals by the Government was such as that the taxing power remained. Compare *Gunter* v. *Jackson,* 130 Miss. 686, 94 So. 842.

VII. Wherever in Mississippi, There Is a Statutory Power Vested in a Board of Limited and Special Jurisdiction, It Must Act by Its Minutes and Its Minutes Must Affirmatively Disclose the Jurisdiction. A Failure So Thus to Do Invalidates.

And so, Mississippi, by reason thereof, never surrendered to the United States its tax sovereignty as to these minerals under this alleged reservation. Wherever in Mississippi there is vested in a board of limited and special jurisdiction, it must act by its minutes and its minutes must affirmatively disclose the jurisdiction. A failure so thus to do invalidates. The entries made by the Forestry Commission, Tr. 156, and by the Board of Supervisors, Tr. 158, 161, with deference, directly contravenes that thus made mandatory by our decisions beginning with *Bolivar County* v. *Coleman,* 71 Miss. 832, 15 So. 107, and the multitude of cases which followed it. Compare *Green* v. *Board of Supervisors of Adams County,* 172 Miss. 573, 161 So. 139, 141, wherein it is said:

> "It is the settled rule in this state that boards of supervisors exercise only limited and special jurisdiction, and that in the exercise of their limited statutory authority all the necessary jurisdictional facts must appear on the record of their proceeding. And an order of the board of supervisors authorizing the issuance of bonds which does not affirmatively show the facts necessary to give the board jurisdiction is void. (Citing many cases.)."

Approved in *Simpson County* v. *Floyd,* 192 Miss. 501, 6 So. 2d 580.

Consent in accordance with Mississippi's laws being thus requisite and not having been, Mississippi's exclusive territorial jurisdiction was never divested.

For these several reasons in view of the presumption of validity under Mississippi's tax sale statute, it is obvious that the title so obtained is paramount for these many reasons. The Government never effectively controverted, with deference, on any substantial ground these positions and especially never fairly met the issue that under the Weeks Act a reservation of this type developed as this was continued all property rights in the minerals wherefor the Government had not paid and whereasto the reservor continue to be vested with perfect title with full right of development, but if therein we err, then the possibility of reverter under the background here existent was divested through paramount state sovereignty.

Point III

The Weeks Act, If It Embraced the Acquisition of Severed Minerals, Was Unauthorized by the Federal Constitution.

Wherein consider:

1. The Commerce Clause. We submit that being a government of limited power, as hereinabove set forth, Congress could not validly have passed the Weeks Act to authorize the purchase—the condemnation—of underlying minerals, thereasto not being in any way appropriate as to navigation of the streams.

2. There is a contravention of the Tenth Amendment.

So these factors being integrated there was a sale by Mississippi to Hendrix of these minerals on September 21, 1942, whereby as at that date he became the absolute owner, but without right to possession for a period of two years, during which the right to redeem persisted. Before the

expiration of these two years the United States, during a war period, took possession of the minerals and thereasto made precisely those leases which were potentially possible through the development made by Kalmia and that now by the Government contended is that all of these questions fundamentally integrated have been by this reservation wiped out because under the reservation the provision for extension was, Tr. 23:

> "Provided; That if at the termination of the said ten year period of reservation it is found that such oil, gas, and other valuable minerals, mineral rights, and interests are being operated at any time during the preceding five years, to commercial advantage, then and in that event, the said right to mine and remove said oil, gas, and other valuable minerals, shall extend for a further period of five years, and further: That the right to mine and remove oil, gas, and other valuable minerals shall extend * * *."

Without more ado, the Government took possession and excluded Hendrix, taking the position properly that it was not as a sovereign subject to a suit and yet with these judicial questions thus therein it excluded Hendrix, and in thus doing without affording an opportunity for judicial determination, it extended (independently of all else) this reservation under well settled principles hereinabove set forth.

Compare 2 *Summers Oil and Gas,* 2nd Ed., Ch. 10, Sec. 301, p. 159, and authorities *supra.*

Furthermore, the United States, not being subject to suit, prevented by its act this determination from being there made, and having thus prevented the performance of a condition may not therefrom profit and take from Hendrix that information developed and that profit potentially possible, in virtue of its sovereignty. Furthermore, a contract of this kind which thus effectively deprived

Hendrix of access to the courts for a determination of his controversy is void. Again, when this tax sale was thus made and Hendrix became the purchaser, every presumption under Mississippi's law was pledged prima facie thereto and it became obligatory upon the United States, when it sought to subvert that title affirmatively, to prove judicially those factors therefor requisite, and when the courts below imposed this obligation contrary to the statute, upon petitioner, Hendrix, thereby there was contravention of the law.

Point IV

Under the Original Reservation Kalmia Had the Unquestioned Right to Remove All Oil, Being Possessed Thereof as of a Determinable Fee.

The reasons therefor have hereinabove been stated in another aspect under Point II, subdivision II and are not restated but are integrated by reference.

Point V

Property in Oil Is Admeasured by State Not Federal Law

Covered in Point II, subdivision V, *supra,* and reintegrated by reference.

POINT VI

Under the Reservation of the Oil, under a Deed Prepared by the Government, Underlying Weeks Land, With the Policy of the National Forest Reservation Commission Thereasto, the Provision in the Deed Requiring "It Be Found" in Order to Effectuate Further Renewals, by Reason of the United States Not Being Suable and the Other Reasons Herein Set Forth, Made the Provisions in the Deed Covenants Compensable in Damages Not Conditions Whereunder Forfeiture Might Be.

Fully developed *supra* under Point II, subdivision V, and reintegrated by reference.

POINT VII

The Court of Appeals in the Fifth Circuit in Holding Kalmia Not Entitled to Rely upon Representations of Government Officials as to the Extent of the Provisions to be Contained in the Deed and Excluding as Incompetent Evidence Tendered, Established a Rule (a) Contrary to the Rule in This Court, Bull v. United States, 295 U. S. 261, 79 L. ed. 1421; (b) Contrary to the Rule in the Second Circuit and Others, Staten Island Hygeia Ice & Cold Storage Co. v. United States, 85 Fed. 2d 68; and (c) Contrary to the Law as Announced by the Supreme Court in the State of Mississippi.

1. Compare *Penn Mut. Life Ins. Co.* v. *Nunnery,* 176 Miss. 197, 167 So. 416, 418, wherein it is said:

> "• • • A misrepresentation of domestic law, which is but a form of the expression of an opinion, does not ordinarily constitute a predicate for a fraud. For it to do so, it must be accompanied by some inequitable conduct by the person making it, which induced another to rely and act thereon. 2 Pom. Eq.

> Secs. 842-847. One instance of such conduct is where the maker of misrepresentations has or professes to have knowledge of the law superior to that of a person to whom the representation is made, and thereby induces such person to rely and act on the misrepresentation. * * *."

Sp. *Penn Mutual Life Ins. Co.* v. *Nunnery*, Miss., 167 So. 420. Approved in *Watson* v. *Massachusetts Mut. Life Ins. Co.*, C. C. A. D. C., 140 Fed. 2d 673, certiorari denied, 322 U. S. 746, 88 L. ed. 1578.

2. Compare *Nash Mississippi Valley Motor Co.* v. *Childress*, 156 Miss. 157, 125 So. 708, 709, wherein it is said:

> "* * * If a false statement is made by one who may be fairly assumed to know what he is talking about, it may be accepted as true, without question and without inquiry, although the means of correct information are in reach. * * *."

Most recently approved in *James* v. *Federal Royalty Company*, — Miss. —, 44 So. 2d 542, 544; *Brown* v. *Ohman*, — Miss. —, 42 So. 2d 215, 43 So. 2d 729; *Reed* v. *Charping*, — Miss. —, 41 So. 2d 12; *White* v. *Union Producing Company*, 140 Fed. 2d 176, 178, wherein Judge Mize was reversed, the Court there saying:

> "The court said that, assuming the fraud to have been perpetrated and that the lessor did not read the lease, or the draft for five dollars given her for executing it, yet she was guilty of such gross negligence in failing to read the draft that she was precluded from claiming that the agreement should be set aside for fraud. For this reason it held that she could not recover. We think the court erred in so holding, because under the Mississippi law, which governs our decision, contributory negligence is not a defense to an action based on fraud. The appellant, Mrs. White, had the right to rely upon the representations made to her

by the appellee's agent as to the nature of the paper she was asked to sign, and to accept his statements as true without inquiry, although the means of correct information were within reach."

Remember Conarro was deputed by the Department to act for it when hereasto it had a fixed policy whereof he was constructively well advised and so being obligated thereto to conform. Montgomery was the attorney for the Government and made, according to the proof, a positive representation wherethrough the Government acquired the deed form as is contrary to Kalmia's unquestioned right under the Weeks Act, under the interpretation thereof; and when the District Judge and the Court of Appeals ruled as was done in Finding No. 9, Tr. 423, quoted *supra,* contravention of Mississippi's decisions was flagrant if Mississippi's law is to control which, we submit, with deference, it should.

Point VIII

Provisions in Reservation Deleted by Regulation of Donald M. Nelson, Supra, and by the Petroleum Administrator, Supra, After Execution of the Alleged Reservation.

Thereasto, those with power to act for the Government did in conflict with these terms in the deed as to twenty-five acres so provide and absolutely prohibited that figure from being further lawful. Covered *supra,* Point II, subdivision V(f). Obviously here the subsequent action controlled and abrogated. *"Leges posteriores priores contrarias abrogant"*, 52 *C. J. S.* 1046; *Broom's Legal Maxims,* pp. 27, 28.

POINT IX

The Weeks Act and the Public Policy of the National Forest Reservation Commission Thereasto, Petitioners Representatives Were Actually Deceived by Those Things to Them Told and Having So Been, Thereasto Were Entitled to Relief.

Point II, *supra, passim.*

POINT X

The Legislature of Mississippi Prohibited from Consenting That the United States Might Acquire the Oil and, Quo Ad the Oil, the Assumed Consent of the Legislature a Nullity.

Covered in Point II, subdivision VI, *supra,* and reintegrated by reference.

POINT XI

Wherever in Mississippi, There Is a Statutory Power Vested in a Board of Limited and Special Jurisdiction, It Must Act by Its Minutes and Its Minutes Must Affirmatively Disclose the Jurisdiction. A Failure So Thus to Do Invalidates.

Covered in Point II, subdivision VII, *supra,* and reintegrated by reference.

Conclusion

The action of the Government hereasto wrecked Kalmia and imposed upon its guarantors onerous obligations and overlooked, through the action of its local representatives, the fundamental public policy of the Weeks Act which in

no way sought to divest without compensation minerals from its subjects. Herein, it is respectfully submitted:

1. That there is an irreconcilable conflict between *State of Washington* v. *United States,* 87 Fed. 2nd 421, C. C. A. 9th, and the decisions in this Court and the ruling herein as to indispensable parties rendering rectification here requisite.

2. That herein under the Weeks Act, if properly construed, there remained vested in Kalmia this oil substantially in fee and wrongfully divested by the Court of Appeals under a construction of "commercial advantage" wholly foreign to the purpose and intent of the Weeks Act.

3. That the representatives of the Government in obtaining these deeds made hereasto false representations wherefrom the United States has been given a monumental advantage and the ruling in this case permitting confirmation is in palpable conflict with the rule in this Court in the cases of *Bull* v. *United States,* 295 U. S. 247, 79 L. ed. 1421; *Snell* v. *Ins. Co.,* 98 U. S. 85, 25 L. ed. 52; *United States* v. *State National Bank,* 96 U. S. 30, 24 L. ed. 647; in the Second Circuit in the case of *Staten Island Hygeia Ice & Cold Storage Co.* v. *United States,* 85 Fed. 2d 68; and in the Supreme Court of the State of Mississippi, compare authorities *supra;* this Court remembering that the District Judge specifically excluded the direct representation, false in fact, made by the United States attorney when this transaction was in process of closing. The exclusion of this evidence paralyzed petitioners' cause.

4. Under the Weeks Act oil reserves are governed by state law, especially as to taxation, and the Court of Appeals flagrantly departed from the settled rule here. Compare *United States* v. *Gerlach Live Stock Co.,* — U. S. —, 94 L. ed. 876. The determination of oil reserves underlying the na-

tion-wide acquisition under the Weeks Act, whether it be governed by state law or federal law and the extent whereto the state may exercise taxing power thereover, is such a fundamental question as here demands exposition, extending that intimated, with deference, in *Wilson* v. *Cook*, 327 U. S. 474, 90 L. ed. 793, especially if the dissenting opinion correctly mirrored the Court's intention.

5. As to non-essential minerals under the Weeks Act land, the United States being engaged in a purely private capacity for profit, state sovereignty as to ad valorem taxes remained the converse of *South Carolina* v. *United States*, 199 U. S. 437, 50 L. ed. 261.

6. But more important still, plain, American citizens in dealing with their government during a panic and in the time of war peril were not treated fairly. That to them belonging justly under the spirit of the Weeks Act was from them snatched by one who would be rapacious for the Government. In short, rectification here is requisite to restore that confidence in the Government so seriously shattered by that herein precedently validated by the inferior federal courts, especially in view of the fundamental purpose of the Weeks Act as administered by the National Forest Reservation Commission to leave the citizens vested with their minerals, this court not conflicting with that sought under the Weeks Act but being substantially promotive of the general welfare.

The questions discussed are fundamental and of paramount importance and certain important facets have been mirrored in somewhat conflicting decisions of this Court whereasto clarification, with deference, is not unessential.